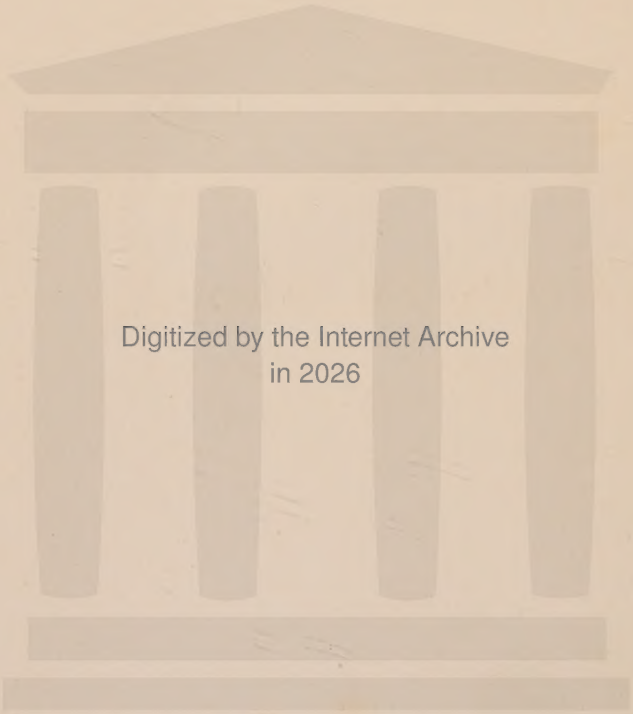
Leland B. Dow.
With undying affection
from Mother

April 5 – 1931.



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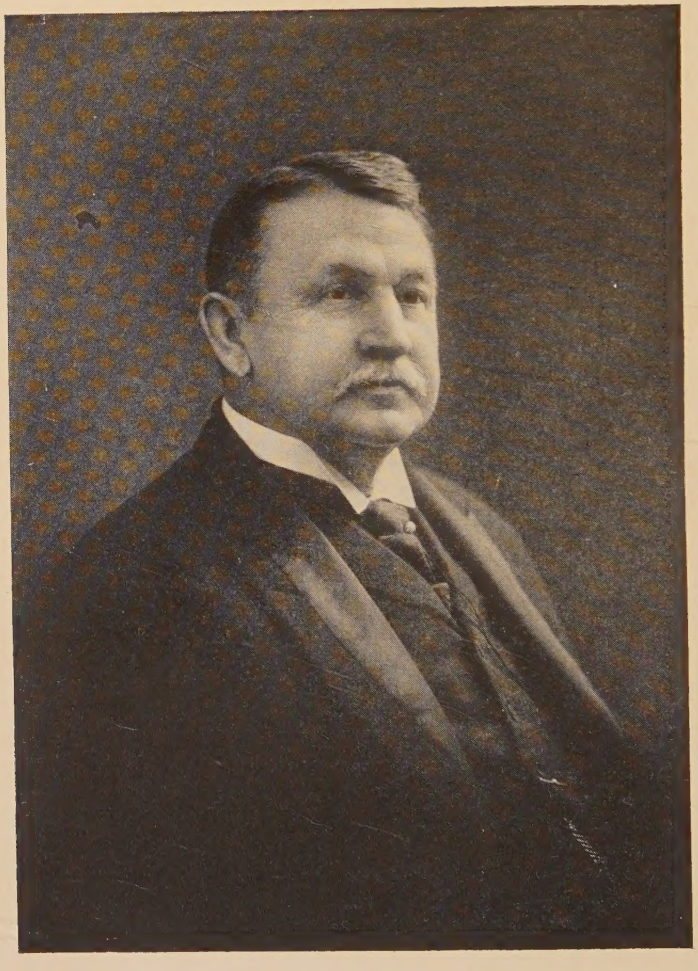
DIPLOMATIC EPISODES



Wm C. Morey

DIPLOMATIC EPISODES

A REVIEW OF CERTAIN HISTORICAL INCIDENTS BEARING UPON INTERNATIONAL RELATIONS AND DIPLOMACY

BY

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With an Introduction
BY
DAVID JAYNE HILL

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IS AFFECTIONATELY INSCRIBED

TO MY

HONORED AND DEVOTED WIFE

INTRODUCTION

BEFORE his lamented death, on January 21, 1925, Professor William Carey Morey had collected, with the purpose of offering them for publication, the papers now presented under the title he had chosen for them. They now appear as his hand left them, his last legacy to the successive classes of students who, at the University of Rochester and through his books, for more than forty years followed his illuminating instruction in the history of political institutions.

These "Diplomatic Episodes" constitute no part of Doctor Morey's formal instruction to his classes. Like many other papers from his hand, they are brief disquisitions upon subjects which he deemed of importance to men of culture and were composed and presented to his classes as supplementary information rather than as constituent parts of his general courses of study. It is perhaps from this point of view that they will make their appeal to a wider circle seeking the same enlightenment.

The wide range of Doctor Morey's learning, his comprehension of the student's needs, the lucidity of his mind and the directness and clarity of his style as a writer contribute to the effective treatment of these carefully selected topics of discussion.

No teacher ever better understood the nature of the student's mind or the art of appealing to his intellectual interest. A varied experience added to an active and logical habit of thought made him a master

in the exposition of any subject to which he devoted his attention.

Born at North Attleboro, Massachusetts, on May 23, 1843, in 1862 he entered the University of Rochester as a freshman in the class of 1866, but almost immediately enlisted in the Army of the United States and served with distinction in the War for the Union, being retired at the end of the war as Brevet Lieutenant Colonel of Cavalry.

Returning to college he was graduated with the class of 1868. After four years of study and teaching elsewhere, he was called by his Alma Mater to be professor of Latin, a position which he held for ten years, giving special attention to the historical, legal and political literature of that language. In 1883 he gave up his professorship of Latin and was made professor of history and political science, a chair which he occupied with conspicuous success until his retirement as emeritus professor in 1920.

The first fruit of Doctor Morey's special studies was his *Outlines of Roman Law,* which appeared in 1884, a carefully conceived and comprehensive treatise which immediately won a place as a text-book in many colleges. His researches on *The Genesis of a Written Constitution,* published in 1891 in the Annals of the American Academy of Political and Social Science, constitute a valuable piece of original investigation. Later appeared a series of historical text-books, growing out of his regular courses of instruction.

During many years Doctor Morey's opinions on current questions of national and international interest were solicited by the press, eliciting such expressions of sound and mature judgment regarding public policies as are to be found in his essays on "The Treaty-

Making Power and the Legislative Authority of the States" (1909); "The South African Union and British Colonial Policy" (1910); "Federalism and International Liability" (1913); "The Sale of Munitions of War" (1916); and many others.

In Doctor Morey's mind events had little interest apart from their causes and consequences. With all that was merely spectacular he had no concern. As a citizen and as a scholar his mind was pre-occupied with the problems of human progress. His dominant thought was his conviction of genetic relationships in the process of historic development. Nothing, he believed, could be understood by itself.

The absence of system in this collection of detached "Episodes" has its reason perhaps in the fact that Doctor Morey was interested in showing the really episodical character of international law and diplomacy as they exist to-day. With a singular faculty for the orderly arrangement of ideas, he could not overcome his loyalty to truth by making the pretense that these subjects possess in reality the character of an organized science. No one had a clearer perception of what international law might in time become, but in a spirit of faithfulness to reality he preferred to present it in its concrete applications as it actually is.

And this fidelity to reality, I venture to think, is the great merit of this book. Skillfully avoiding the illusions of theory so often interwoven with the substance of doctrine on this subject, he appeals to practice as the test of what the law of nations really is at the present time. But in doing this he discloses also the fundamental principles of international right which, if logically applied, would lead to the creation of a different world.

To the intelligent general reader, especially to the journalist and the legislator, this brief volume should be a stimulus to clear thinking as well as a source of interesting information. It will certainly be warmly welcomed by all those who have enjoyed the privilege of discipleship to this clear-minded and inspiring master, for whose long and distinguished service in the university to which he devoted his life there is due the honor universally ascribed to him by all who, as students or as colleagues, were in any way associated with his work.

David Jayne Hill

Washington, D. C.,
October, 1925.

PREFACE

Diplomacy, in its practical form, has come to be one of the most important functions of the modern state. As an established part of the political system, it is a comparatively new thing in the world, dating only from the seventeenth century, when the chief European states began to keep permanent resident envoys in one another's capitals. In early times it was supposed to deal chiefly with the duties of the ambassador and the complicated etiquette of the court. In later times, with the increase of international relations, it has become more of an art of conducting the business between states and especially of adjusting their conflicting interests. A large part of modern diplomacy relates to the conciliation of international issues, the general direction of which is entrusted to the Foreign Minister.

The causes of friction among sovereign states are innumerable, depending upon their different racial instincts, their separate economic life, their distinct national aims; and the duties of the diplomatist cover a vast variety of subjects, and upon him largely rests the preservation of the world's peace. It has been said by an eminent American statesman that "every controversy between states can be settled when there is a will on both sides to settle it." When guided by reason and a common sense of justice, diplomacy may, in fact, afford one of the most effective remedies for war.

Notwithstanding the well-nigh universal profession of a desire for peace, human experience seems to show that the theoretical possibilities of diplomacy do not always appear to be realized in the actual processes of diplomatic procedure. The seeds of discord continue to exist in human nature and in national life, the fruits of which are seen in international rivalries and strife. The moral character, the motives, the temper and the ideals of nations are most clearly exposed when they are engaged in settling their differences with one another. Then they indicate whether they are inclined to make the worse appear the better reason, or to do unto others as they would have others do unto themselves. In many respects, the ethical spirit of a people is shown in their diplomatic methods, whether they be honest and moved by justice, or whether they be dishonest and tainted with trickery and deceit. While every nation is guided by its own moral sense, it may be a question whether the largest part of the world's diplomacy is not inspired by the spirit of fairness and the desire to allay, rather than to excite, the causes of international jealousy and distrust.

To give some concrete examples of practical diplomacy, there have been gathered together in this volume a number of historical incidents bearing upon international relations. These episodes have been discussed to point out the salient points at issue in each controversy, to show the mode in which diplomatic methods may be used in the interests of peace, and to suggest the way in which international diplomacy has extended to the development of certain phases of international law. They show, for example, the difficulties arising from the misunderstanding of a treaty

and the failure to recognize the rights of a neutral state, as was the case in the first diplomatic controversy between Great Britain and the United States during the administration of Washington. They show the unexpected issues that may arise from a federal form of government in dealing with an international question, as occurred to Daniel Webster, while Secretary of State, in the noted case of the "Caroline." They also show how the international law of recognition became clarified and rendered more distinct to the American people, through the efforts of the United States to enfranchise the oppressed people of Cuba.

One of the most remarkable illustrations of the perversion of modern diplomacy is seen in the threatened partition of China by the Western European powers —there being no instance in recent times of such a systematic attempt to exploit the resources of an independent state, except perhaps that of Poland. A far different use of diplomatic methods was evident in the opening of the Suez canal—the status of which was not fixed at the outset by any provision of the existing international law, but for which European diplomatists provided a new law to meet the case in hand. How far the international policy of the United States conformed to the principles of international law, in the opening of the Panama canal, is perhaps still a mooted question, but it is discussed by the author, who inclines to the affirmative.

In these discussions there is explained the important part taken by the United States in the development of the modern law of neutrality, and the application of that law in respect to the sale of munitions of war during the recent world conflict. The need of diplomatic methods in the adjustment of the relations be-

tween a sovereign state and its dependent people, is seen in the progressive reforms of the British colonial system. It may seem desirable that a volume devoted to diplomatic methods should attempt to throw some light at least upon the mooted question of peace, without adopting the sentimental view of the pacifist or the idealistic view of the speculative philosopher. It may be a question whether there may not be a scientific view based upon the facts of social evolution, in which the successive stages of pacification may be traced in the progressive development of human society, and which may suggest the future steps that may be necessary for the further enlargement of the areas of peace.

In the treatment of these various subjects it has been the purpose to adhere as strictly as possible to the historical point of view—dealing with facts rather than with speculations. All the discussions are based upon authentic sources, with occasional reference to standard works, and with no attempt at detailed bibliography, with the simple purpose of making the subject-matter as accurate and lucid as possible.

University of Rochester,
Rochester, N. Y.

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DIPLOMATIC EPISODES

CHAPTER I

OUR FIRST DIPLOMATIC CONTROVERSY: A PRELUDE TO THE JAY TREATY

The Treaty of Peace with Great Britain in 1783, which closed the War of the Revolution and secured the Independence of the United States, marks the proper beginning of our diplomatic history. It is true that before this time, Benjamin Franklin had represented the interests of the American colonies in England and in France. It is also true that the Continental Congress had come into diplomatic relations with some of the states of Europe. Treaties of commerce and alliance had been made with France in 1778, and commercial treaties had been made with the Netherlands in 1782 and with Sweden in 1783. But still it was not until the treaty with Great Britain was ratified that the international status of the United States became fully recognized, and this country obtained an undisputed membership in the family of nations.

While the United States were thus brought within the international system of Europe, the wide distance which separated the two continents led many to hope they would not become entangled in the international politics of the Old World. But this hope was doomed to disappointment. The commercial relations arising

between this country and foreign powers revealed the fact that the Ocean did not so much separate as it joined the two continents. Whatever disturbed the equilibrium of Europe affected the tranquillity of this country. For example, the intense hostility developed between Great Britain and France was reflected in the almost equally bitter hostility between the political parties led respectively by Hamilton and Jefferson. The party of Hamilton, or the so-called "Federalists," looked to England as the home of constitutional government and the nation from which we had derived our blood and many of our institutions. On the other hand, the party of Jefferson, or the so-called "Anti-Federalists," looked to France as the birthplace of liberty and the country by whose aid we had gained our independence. Americans were thus, by their sympathies and their interests drawn into the arena of European politics.

The diplomatic difficulties which disturbed the relations between the United States and Great Britain, from the Treaty of 1783 to the negotiation of the Jay treaty in 1794, may be referred to three principal causes, namely: (1) the non-execution of the Treaty of 1783; (2) the refusal of Great Britain to enter into commercial relations with the United States; and (3) the commercial restrictions and aggressions upon the neutral rights of the United States.

§ 1. Non-Execution of the Treaty of 1783

The primary purpose of the Treaty of 1783 was, of course, to secure the formal acknowledgment, on the part of Great Britain, of the independence of the United States. This recognition was definitely pro-

vided for in the *first* article of the treaty, which declared that: "His Britannic Majesty acknowledges the said United States . . . to be free, sovereign and independent states, and that he treats with them as such; and for himself, his heirs and successors, relinquishes all claims to the government, property and territorial rights of the same and every part thereof."

But there were other matters that needed attention in negotiating a final treaty. There were, in the first place, creditors on either side, the collection of whose lawful debts had been interrupted by the late war. It was therefore agreed in the *fourth* article that "creditors on either side shall meet with no lawful impediments to the recovery of the full value in sterling money of all *bona fide* debts hitherto contracted." There were, in the next place, many estates of British subjects that had been confiscated during the war, the restoration of which was much desired by Great Britain. It was therefore agreed in the *fifth* article that the Continental Congress "shall earnestly recommend to the legislatures of the respective states to provide for the restitution of all estates belonging to real British subjects." Furthermore, it was possible that the rights of British persons might in the future be prejudiced on account of the part they had taken in the recent war. And so it was provided in the *sixth* article that "there shall be no further confiscations made, nor any prosecutions commenced against any person or persons, for or by reason of the part which he or they may have taken in the present war." These three provisions, contained in the *fourth, fifth* and *sixth* articles were intended especially to protect the rights of British subjects.

On the other hand, American interests were not

entirely disregarded. In drawing up the treaty, attention was called to the fact that the British armies and fleets were still within the territory of the United States, and the time for their withdrawal had not been definitely fixed, and even in the process of their withdrawal they might be tempted to destroy, or carry away with them, certain property belonging to American citizens. Hence, it was provided in the *seventh* article that "His Britannic Majesty shall, with all convenient speed and without destroying or carrying away any negroes or other property of the American inhabitants, withdraw all his armies, garrisons and fleets from the said United States, and from every post, place or harbour within the same." (For the treaty, see *Treaties and Conventions of the U. S.*, Vol. I, pp. 286-290.)

These were the special provisions of the Treaty of 1783, which formed the basis of the ensuing controversy between the United States and Great Britain. The question soon arose as to how far the rights and obligations specified in the treaty were respected. On the part of the United States, it was first claimed that the British commander, in withdrawing his fleet, had carried away about three thousand negroes belonging to American citizens, and also that the British garrisons continued to remain on American soil, contrary to the terms of the treaty.

On the part of Great Britain, it was admitted that negroes had been carried away with the withdrawal of the fleet. But it was claimed that these negroes were not at the time the property of the inhabitants of the United States, since they had come into the British lines before the close of the war, under the promise of liberty, and consequently their embarkation was no

infringement of any proprietary rights which existed at the time the treaty was made. It was also admitted that British garrisons still held posts within the territory of the United States; but this was justified on the ground that the obligations imposed upon the United States by the terms of the treaty had not been fulfilled, in that British subjects still met with legal impediments in the collections of their debts; and also that the confiscated estates of British subjects had not been restored, as Great Britain had reason to expect from the provisions of the treaty.

It should here be kept in mind that the Treaty of 1783 was made while the United States was under the "Articles of Confederation," with the very limited powers which that document granted to the Continental Congress in dealing with foreign powers. By referring to the *fifth* article of the treaty, it will be seen that the Congress of that day strictly conformed to the powers it actually possessed, in agreeing earnestly to *recommend* to the legislatures of the several states to provide for the restitution of the confiscated estates. As a matter of fact, Congress did by a proclamation (dated Jan. 14, 1784) enjoin upon all state authorities to carry into effect the provisions of the treaty, and did at the same time earnestly recommend to the several states to restore to British subjects their confiscated estates. This recommendation was repeated in a circular letter transmitted to the governors of the several states on April 14, 1787.

These alleged infractions of the Treaty of 1783 were made the subject of complaints on the part of both nations for several years. The non-execution of the treaty seemed especially grievous to the United States, since the continued presence of British troops was re-

garded as inciting the Indians to hostility, and hence presenting a permanent obstacle to the settlement of the Western lands. It was not until after the adoption of the Federal Constitution in September, 1787, that these difficulties were brought to a direct issue in a regular and diplomatic manner. It was at this time that Great Britain first established permanent diplomatic relations with the United States, by sending Mr. George Hammond as Minister Plenipotentiary to this country. Mr. Thomas Jefferson was then Secretary of State for the United States.

After being assured that the new British minister possessed full power to enter into negotiations respecting the differences between the two countries, Mr. Jefferson proposed that each side should specify the particular acts which he considers to have been done by the other in contravention of the treaty. He himself set the example by citing the *seventh* article of the treaty, which provided for the withdrawal of the British forces "with all convenient speed, and without carrying away any negroes or other property of the American inhabitants." In respect to the withdrawal of the British forces, Mr. Jefferson made these specific points: (1) that the British garrisons were not withdrawn with all convenient speed, nor had they yet been withdrawn from Michillimackinac, Detroit, Fort Erie and Oswego on the Great Lakes, nor from Pointe Au-fer and Dutchman's Point on Lake Champlain; (2) that the British officers had, in fact, undertaken to exercise jurisdiction over the country and the inhabitants in the vicinity of these posts; and (3) that they had excluded the citizens of the United States from navigating even on our side of the middle line established as a boundary between the two countries.

In respect to the carrying away of the negroes, Mr. Jefferson specifically declared: (1) that a large embarkation of negroes took place before the arrival of our commissioners who were appointed to superintend the embarkation; (2) that nearly three thousand others were publicly carried away by the avowed order of the British commanding officer, and against the remonstrance of our commissioners; and (3) that a great number were carried off in private vessels without opposition on the part of the commanding officer. All these acts were declared to be inconsistent with the terms of the treaty.

The British minister, Mr. Hammond, had already in his preliminary correspondence called attention to the fact that the King, his master, had been induced to suspend this seventh article, to which Mr. Jefferson referred, "in consequence of the non-compliance on the part of the United States of the engagements contained in the fourth, fifth and sixth articles of the treaty"—which articles referred to the collection of British debts and the matter of confiscated estates. Mr. Hammond, now in direct reply to Mr. Jefferson, stated the specific claims of Great Britain. While being compelled to admit that Congress had twice sent recommendations to the several states as required by the *fifth* article, he insisted that by the *fourth* article the United States had positively agreed there should be no lawful impediment to the collection of British debts. It could not be presumed, he said "that the commissioners who negotiated the treaty would engage in behalf of Congress to make recommendations to the legislatures of the respective states which they did not expect to be effectual, or enter into direct stipulations which they did not have the power to en-

force." As a matter of fact, Mr. Hammond declared, the states had not repealed their confiscation laws; they had not restored the estates already confiscated; and they had not, either in their legislatures or in their courts, supported British creditors in their efforts to recover the full value of their debts.

To these claims of Mr. Hammond, Mr. Jefferson made a reply, which forms one of his most able state papers. He showed, in the first place, that the term "recommend" as used in the treaty was not misunderstood by the American commissioners, who negotiated the treaty and who fully comprehended the limitations of Congress at the time the treaty was made. He showed that the term was not misunderstood by the British commissioner who, at the time of the negotiation, was warned that the states would probably refuse to heed such a recommendation. He also showed that it was not misunderstood by the British ministry, nor by the members of Parliament, as evidenced by many extracts from their speeches in both Houses. Moreover, in this reply, Mr. Jefferson took occasion to show that the Continental Congress had conscientiously fulfilled the obligations imposed upon it by the treaty; and he proved, by a detailed examination of the legislative acts and judicial decisions of the several states that their attitude had been, in the large majority of cases, favorable to British creditors.

But the most incisive point in Jefferson's argument rested upon the principle that priority of time in the infraction of a treaty, on the part of one party, justifies a non-compliance on the part of the other party. The British minister had sought to justify the non-withdrawal of the British troops from American posts on the ground that the United States had been dila-

tory in carrying out their engagements. But the truth was that Great Britain was the one that first ignored the treaty by carrying off the negroes immediately at the close of the war. If Great Britain insisted that the negroes were not, at the time, the legal property of American citizens, she was still the first to infract the treaty in the failure to withdraw her garrisons as stipulated—because it was a principle of international law that when the precise time for the execution of an obligation is not stated, it is understood to take effect immediately; but also because it was an express stipulation of the treaty itself that the British troops should be withdrawn "with all convenient speed." If Great Britain had failed to execute an immediate obligation, she had no claim against the United States for any subsequent infraction that might be alleged. (For this correspondence, see Wait's *State Papers,* Vol. I.)

The friends and enemies of Mr. Jefferson might perhaps differ as to whether his arguments were capable of being answered. As a matter of fact, they were never answered by the British government. In acknowledging the receipt of Jefferson's communication (dated May 29, 1792) Mr. Hammond said that he would transmit it without delay to his Court for the consideration of his Majesty's ministers. Nearly thirteen months later (June 19, 1793) Jefferson asked when he might expect the honor of a reply. Mr. Hammond answered that his instructions had probably been delayed by the interesting events which were then transpiring in Europe. After the lapse of another five months (Nov. 13, 1793) Mr. Jefferson, at the request of the President, again sent a communication to the British minister asking whether a reply might not then be expected. To this inquiry Mr. Hammond

replied that he had not yet received such definite instructions as would enable him to renew the discussion.

This closed the diplomatic correspondence regarding the infractions of the Treaty of 1783. But the wounds still remained open; the northern forts were still held by British soldiers; the Indians still remained in a state of hostility; and the Western lands were still unsettled.

§ 2. British Refusal to Enter Commercial Relations

In the meantime there had come into prominence other matters which seriously affected the peaceful relation of the two countries. These difficulties, which began with a series of annoyances not sufficiently grave to warrant a formal protest, increased in importance and complexity, until at last war seemed imminent. It may be said that these misunderstandings were due, not simply to the non-fulfillment of treaty obligations, as we have already indicated, but also to the continued refusal of Great Britain to enter into any commercial treaty relations with the United States. This refusal may perhaps be explained, at least in the first instance, by the absence of sufficient authority on the part of the United States, under the old Confederation, to warrant such an arrangement.

From the first, the Continental Congress itself had perceived the benefit of such commercial treaties with foreign powers. Even before the Treaty of 1783 it had formed commercial alliances, as we have seen, with France, with the Netherlands and with Sweden. But it was with Great Britain that the United States

especially desired to enter into a commercial arrangement based on treaty stipulations. The American Commissioners, who had concluded the Peace of 1783, had been authorized to introduce into that treaty certain commercial articles. John Adams had similar authority to negotiate a commercial treaty with England. But the younger Pitt, who was then Prime Minister of England, declined to enter into any commercial arrangements with the United States on account of the political incapacity of Congress at that time to enforce any such treaty.

That this precaution was well grounded may be readily seen by referring to the "Articles of Confederation." These Articles gave to Congress the power of "entering into treaties and alliances, *provided* that no treaty of commerce shall be made whereby the legislative authority of the respective states shall be restrained from imposing such imposts and duties on foreigners as their own people are subjected to, or from prohibiting the exportation or importation of any species of goods or commodities whatsoever." It has been well said that "no government would knowingly concede valuable commercial privileges to the citizens of the United States in return for a treaty which the government of the United States had no power to enforce, and which the respective states had a vested right to nullify at pleasure." (Alex. Johnston, in Lalor's *Cyclopedia of Political Science,* Art. "Jay's Treaty.")

But after the adoption of the Federal Constitution of 1787 all this was changed. Full constitutional power over treaties was now given to the Federal government. After his inauguration President Washington made repeated efforts to establish commercial re-

lations with Great Britain on a treaty basis. But Great Britain, as persistently as before, but not with the same reason as before, still declined to enter into such relations. Whereupon the President, in a message to Congress (Feb. 14, 1791), called attention to his efforts "to come to an understanding with the Court of London, and to his having authorized informal conferences (on this subject) with the British ministers." On account of these failures the President said: "I do not infer any disposition on their part to enter into any arrangements merely commercial."

In thus refusing to enter into any treaty relations, as the President desired, Great Britain did nothing that could be regarded as inconsistent with her international rights. It may have shown a spirit of self-interest; it may even have betrayed an unfriendly feeling. But it furnished no basis for a diplomatic protest; and no diplomatic protest was made. But it did set in motion a train of influences that led to a more complete understanding of the commercial policy of England, and the way this policy affected the interests of the United States.

The message of the President, informing Congress of his failure to influence the British government, was referred to a committee of the House of Representatives. This committee called up the whole subject of American commercial relations, and the propriety of adopting measures by which these relations might be improved. By a House resolution (Feb. 21, 1791) the report of this committee was referred to the Secretary of State, Mr. Jefferson, with instructions "to report to Congress on the nature and extent of the privileges and restrictions of the commercial inter-

course with foreign nations, and such measures as he shall think proper to be adopted for the improvement of the commerce and navigation of the United States." (*Annals of Congress*, 1791.)

§ 3. Commercial Restrictions and Neutral Rights

It is unnecessary to revert here to the earlier restrictive policy that had generally been adopted by European nations, and had grown out of the establishment of their transatlantic colonies. It is enough to say that there was now a tendency to relax that policy. The United States Congress, in the first tariff law, had refused to adopt the policy of discrimination against those nations not in commercial alliance with us. Great Britain, however, in her eagerness to prosecute her war against France, seemed willing to ignore her obligations to the United States as a "neutral" nation. When Washington issued his famous Proclamation of Neutrality (April 23, 1793) the American people were especially sensitive with regard to their neutral rights. In the war now going on between England and France (in which other countries of Europe became involved) the United States remained not only the principal trading nation, but the chief *neutral* nation of the world. The commercial interests, therefore, of the people depended upon the maintenance of their neutral rights. But as to what constituted these neutral rights, the United States and Great Britain did not fully agree.

For example, the United States government maintained that military stores only should be regarded as "contraband of war," and liable to be captured by a

belligerent—while Great Britain declared that food, or breadstuffs, though not required in war, should also be considered as contraband, and that all neutral vessels with such cargoes destined to French ports should be liable to seizure. Again, the United States was committed to the principle that a "blockade to be binding must be effective," that is, must be guarded by an efficient naval force, and not simply declared by a paper proclamation—while Great Britain insisted that any neutral vessel bound for a French blockaded port (even though the blockade was a paper one) was a lawful prize when captured anywhere on the high seas. Furthermore, the United States advocated the principle that "free ships make free goods," that is, that a neutral flag protects the cargo, without regard to the hostile character of the goods themselves—while Great Britain declared that any neutral ship, even though carrying a neutral flag, when having on board goods belonging to an enemy, could be captured along with the cargo itself. It is well to notice that the principles advocated by the United States during this controversy, have since been practically accepted, as a part of the "Law of Nations."

But there were coming to the front other causes of irritation. To cut off the American trade with the French colonies in the West Indies, England sought to revive the old "Rule of 1756." This so-called rule provided that "where the colonial trade of one nation is prohibited to other nations in time of peace, a neutral by engaging in such trade in time of war is liable to capture." In other words, a nation that had closed its colonial ports in time of peace, could not open them to a neutral in time of war. As a matter of fact, this "Rule of 1756" did not strictly apply to the existing

state of things, as France had in 1784 (that is, before the beginning of the present war with England) opened the trade of the West Indies to the vessels of the United States. The professed revival of this old rule was intended primarily to cripple France, but it resulted practically in destroying the American commerce with the West Indies.

There was, too, another grievance which was especially exasperating to the American people. To replenish the British army in the present war, the commanders of cruisers were authorized to "impress" British subjects into the military service when found on neutral vessels. The search of American merchantmen on the high seas was itself a humiliation, but the frequent impressment of American citizens on the pretext that they were English-born, was felt to be an intolerable outrage. The whole country was aroused, and a temporary embargo (the first of its kind) was laid by the American government (March 26, 1794), forbidding American vessels to depart from American ports.

There was yet another cause of complaint coming from an almost unexpected source. The pirates of Algiers had been in the habit of making depredations upon the high seas, and of extorting money-payments from various countries. Portugal had, it is true, recently sent a naval force to close the Straits of Gibraltar, thus shutting up the Algerine pirates to the Mediterranean, and preventing, for a time, their further expeditions into the Atlantic. But, strange to say, the British consul-general at Algiers connived with Portugal, now an ally of England, to relieve these ocean bandits and permit them to roam upon the Atlantic, and to prey upon American neutral com-

merce. As a result of this connivance of the British consul, eight corsair vessels were let loose to plunder American shipping.

For all these acts and depredations England was held directly responsible. From this time the question of our foreign relations—especially the British restrictions laid upon our commerce, and the repeated aggression by Great Britain upon our neutral rights—became the most conspicuous features in American politics, the parties being divided by their British and anti-British sympathies.

§ 4. The Congressional Trend toward Retaliation

Whatever doubts may have already existed as to the actual restrictions imposed upon American commerce, were set at rest by the long-expected report (dated Dec. 13, 1793) of Mr. Jefferson, who had been authorized, as we have seen, by Congress to make such a report. While this report dispelled doubts by revealing facts, these facts were decidedly disparaging to the British policy; and the conclusions of Mr. Jefferson pointed unmistakably to the duty of retaliation.

The report showed, for example: (1) that a few unimportant articles, such as bar-iron, of which we did not produce enough for our own use, were admitted into the British ports free of duty; (2) that our tobacco and rice paid heavy duties; (3) that our salted fish, bacon, whale-oils, grains, meals and breadstuffs, were either prohibited or under prohibitive duties; (4) that our ships, even though purchased and used by British merchants, were not permitted to be used in

their trade with us; and (5) that the navigation laws of England bore with special hardship upon our commerce.

Such being the restrictions imposed upon American commerce, as shown by Jefferson's report, the question now arose in Congress how these restrictions should be met? There were but two answers: either by friendly arrangements by which, in the minds of some, they might possibly be removed; or else, in the minds of others, by the acts of our own legislature to counteract their disastrous effects. The former method was preferable; but it had been found to be futile. The latter, though less desirable, would in the present crisis be found possibly the more effectual. "In the commerce of the world," to use the language of Mr. Jefferson's report, "if particular nations, instead of relying upon the enterprise and activity of their own citizens, grasp at undue shares, especially if they seize on the means of the United States to convert them into aliment for their own strength, and withdraw them entirely from the support of those to whom they belong, defensive and protective measures become necessary on the part of the nation whose marine resources are thus invaded." (Wait's *State Papers,* Vol. I, pp. 343 seq., for "Jefferson's Report.")

But it was for Congress to determine how far the report of the Secretary of State should be accepted as indicating the policy of the government. The mind of Congress became evident when a body of resolutions was introduced in the House of Representatives by Mr. Madison (Jan. 30, 1794). The purpose of these resolutions was to carry into effect the recommendations contained in Jefferson's report. Mr. Madison was heartily in favor of the policy of retali-

ation. He had already, as far back as 1789, advocated such a principle in the first tariff law; and, although he was not then successful, he was now fully in accord with the policy outlined by Mr. Jefferson.

The resolutions submitted by Madison were based upon the general principle to discriminate against all nations not in commercial alliance with the United States, imposing special duties upon all articles manufactured by such nations; and also to retaliate upon those nations whose navigation laws operated unfavorably to the United States. Though no particular nation was named, one enthusiastic member insisted that honesty demanded that the name of "Great Britain" be inserted in the resolutions.

The debate that followed in the House showed the attitude of the two parties. The chief leaders in this debate were Mr. Smith of South Carolina, and Mr. Madison of Virginia. Mr. Smith represented the opinions of Hamilton against the resolutions. Mr. Madison represented the opinions of Jefferson in their favor. In Hamilton and Jefferson the extreme British and anti-British sympathies seemed to be personified. Hamilton had been charged with undue sympathy with England and with a desire to introduce her monarchical institutions into this country; while Jefferson had been reproached with undue sympathy with France and with a desire to employ the power of this country against England, the great enemy of France. Both of these charges were, no doubt, greatly exaggerated. But still the followers of Hamilton were, in the main, opposed to the policy of discrimination and of retaliating against England; while the followers of Jefferson were equally strenuous in favor of such a policy.

Mr. Smith, who was evidently the spokesman of Hamilton in this debate, claimed that there was nothing in our existing commercial relations to afford any special ground for complaint against Great Britain any more than against France. If the British system was less favorable to our navigation, it was more favorable in other respects. England consumes more of our products than does France, and is hence a better customer with whom to deal. If we discriminate against Great Britain, she will surely retaliate against us; and we will be drawn into a war for which we are poorly prepared. Mr. Madison, on the other hand, denied that our commercial relations with England were as favorable as those with France; and claimed that they tended to discourage our domestic manufactures, and to injure materially our foreign trade.

The debates on the Madison resolutions continued in the House for nearly a month with great vigor and ability displayed on either side, and with results decidedly in favor of a retaliatory policy. The first resolution, asserting the general policy of discrimination, was carried (Feb. 3, 1794) by a vote of fifty-one to forty-six. The discussion of the remaining resolutions was postponed until March "to await the progress of events." But these remaining resolutions never came to a vote. In the meantime other unfriendly acts on the part of Great Britain were brought to the attention of the American people which seemed to demand more radical measures of redress than those proposed in the Madison resolutions. During the previous debates the possibilities and dangers of war had been frequently mentioned; but the new encroachments of England seemed to make war inevitable. (For the debates on Madison's resolutions, see "An-

nals of Congress" 1794, which are condensed by Hildreth, *Hist. of U. S.*, IV, 459-476.)

The new complications which now appeared to interrupt the passage of the Madison resolutions, and which rendered our commercial relations with England not only unsatisfactory but well-nigh intolerable, were due to "the vexations and spoliations committed on American commerce." The President had already informed Congress that such depredations were reported; but no proofs had then appeared. Trustworthy information was now received that American vessels in the West Indies had actually been seized and condemned by the British authorities. The policy of England was clearly revealed in the British "Orders in Council" and in the instructions issued to British cruisers. In order to create a famine in France, it was found that the Pitt ministry had in the previous year (June, 1793) instructed English cruisers to detain all neutral vessels bound to France with cargoes of provisions, upon offering due payment for the same. A later instruction (November, 1793) ordered the detention of all vessels laden with the produce of any French colony, or carrying any supplies for the use of such colony.

It is not necessary to enumerate the various ways in which these restrictions tended to embarrass and despoil American commerce. They were regarded by Congress as infringements upon the neutral rights that Americans claimed as their peculiar possession. It now remained for Congress to find some means to redress the wrongs that were being inflicted upon us by a foreign power. In view of the neutral attitude that the United States had observed, from the first, the policy of Great Britain seemed especially irritat-

ing to the American people. At the very beginning of the Anglo-French war, Washington had issued his Proclamation of Neutrality, and had insisted upon its strict observance. When the French minister, Genet, came to our shores and attempted to draw this country into an alliance with France against Great Britain, his fiery zeal had been quickly "snuffed out" by the President. And now the infringements of England upon our neutral rights, and the repeated assaults upon our shipping, seemed an unfair reward for our fidelity.

For all these reasons the hostility toward England grew in strength and bitterness; and the British sympathizers in Congress were reduced to a waning minority. Edmond Randolph, the new Secretary of State, submitted specific complaints and positive proofs regarding what were called "the vexations and spoliations upon our commerce." Resolution after resolution was introduced into Congress to increase the military force of the country, to strengthen the naval armament, and to provide adequate remedies against the wrongs from which we were suffering. Mr. Dayton, a New Jersey federalist, who had imbibed the war spirit, introduced a resolution (March 27, 1794) to sequester all debts due from Americans to British subjects, and turn them into a fund to indemnify American sufferers from British spoliation. Mr. Dexter of Massachusetts proposed (March 31) that the President be empowered to organize 80,000 effective militia, to be ready to march at a moment's warning. A resolution was finally introduced (April 7th) by Mr. Clark of New Jersey to prohibit all commercial intercourse with Great Britain, until restitution had been made for all losses growing out of British

aggressions, and until all posts held by British garrisons in the United States should be surrendered. This proposal in favor of non-intercourse passed the committee of the House; it would certainly pass the House in regular session, and would probably pass the Senate.

§ 5. The President's Interference for Peace

While Congress was thus providing remedies against the aggressions of England—aggressions against our rights as a neutral nation, as well as against our rights secured by the Treaty of 1783—the angry temper of the whole country was aroused by a report, recently published, that Lord Dorchester, the British governor of Canada, had in a recent speech to the Indians forewarned them of the coming war between Great Britain and the United States.

In the midst of this tempest of anti-British feeling and hostile action, which was fast driving the country into war, was suddenly heard a voice calling for peace. It was the voice of Washington. On the 19th day of April, 1794, the Senate received a communication from the President submitting the name of John Jay as minister extraordinary to Great Britain for the purpose of securing a "friendly adjustment of our complaints." Although the Senate was equally divided between the parties, the influence of Washington is seen in the fact that the nomination of Jay was confirmed by a vote of eighteen to eight. The House persisted in passing the non-intercourse act, which was, however, defeated in the Senate by the casting vote of the Vice-president, John Adams.

There were few instances in the eight years of Washington's administration when his influence was

so strongly and beneficially felt, as when he interfered to prevent the country from being plunged into a war with England. To Congress and the country the aggressions of England seemed to justify the most hostile measures of redress. The charges against her were specific and pointed. She had broken the Treaty of Peace of 1783. She had haughtily disdained to enter into any commercial relations with us. She had imposed restrictions upon our commerce which had seriously affected our industrial prosperity. She had above all committed spoliations upon our merchant marine, contrary to our rights as a neutral nation. If England has smitten us, shall we not also smite England? So it seemed to Congress, so it seemed to the country. But not so did it seem to Washington. In the face of what seemed to be the most flagrant wrongs there should be some room left for calm judgment. And this judgment should be based upon what was expedient and what was right. The country was at this time in no condition to endure the drafts upon her life and resources which a war would entail. On the other hand, England was at the height of her military power. She was in armed alliance with some of the chief nations of Europe against France. It was not only impolitic for us to enter into hostilities with England, when England meant a great part of Europe except France; but it was also wrong to adopt hostile measures when the resources of peace had not been exhausted. It might seem to many that the failure of the previous diplomatic correspondence between Mr. Hammond and Mr. Jefferson was sufficient to discourage any further attempt to settle by negotiation the more complicated difficulties growing out of our commercial relations.

But against this storm of opinion, which demanded hostile and discouraged amicable means of redress, Washington stood firm. He was, indeed, in this crisis the Apostle of Peace. To many in Congress the aversion to war might seem but another name for cowardice. But no one could charge with cowardice the man whose sword had achieved our independence. It required no more courage to be "first in war" when war was a fact, than to be "first in peace" when war was threatened. Waiving his first choice, Alexander Hamilton, he gave to John Jay the responsible task of settling by negotiation what Congress and the country had proposed to settle by retaliation and war—John Jay, the Chief Justice of the United States, and after the President the most trusted and irreproachable citizen of America, whose profound knowledge of the law, inflexible sense of justice and solidity of judgment, had already won for him the confidence of all; and whose honor and integrity are best described in the later words of Webster: "When the judicial robe fell on John Jay it touched nothing less spotless than itself."

The appointment of Jay led quickly to the suspension of all action in Congress in regard to our foreign relations, and tended to subdue the tone of hostile feeling against Great Britain. From this time for eleven months, the country waited, with varying degrees of patience and anxiety, for the results of Jay's negotiations.

CHAPTER II

FEDERALISM AND INTERNATIONAL LIABILITY: THE CASE OF THE "CAROLINE"

As generally understood, what is called "international law" rests upon the postulate that nations are moral persons, with reciprocal rights and duties—that the possession of certain rights is conditioned upon the fulfillment of certain obligations. The particular form of government which a nation may adopt to control its own affairs is of no concern to others, provided only it does not affect the rights of other nations, and does not prevent the fulfillment of its own international duties.

It must then be a source of chagrin to every patriotic American that the United States government has ever been compelled to enter the plea of incompetence, or "non-liability," in connection with its international obligations. And one's sense of chagrin is not likely to be dispelled when one is informed that this plea of non-liability is due to supposed defects in the Federal Constitution. It, therefore, becomes a very pertinent question, How far international liability may be affected by a federal form of government. This was, as a matter of fact, once made the subject of a bitter diplomatic controversy between Great Britain and the United States, in the now almost forgotten case of the "Caroline."

§ 1. Canadian Revolt and Destruction of the "Caroline"

The circumstances of this case occurred during the well-known revolt against the Canadian government in the year 1837. The revolt was prompted by the desire of certain persons to bring about a reform in the existing government of Canada. The insurgents found many sympathizers among the American people, especially among those residing in the western part of the State of New York. To carry on their hostilities, the insurgents had selected, as a base of operations, a point called "Navy Island" situated on the Niagara river near the Canadian side. This point served a double purpose—not only as a base from which to harass the Canadian government, but also a suitable spot from which to maintain communications with their American sympathizers, who were ready to assist them with men and munitions of war. Such assistance would, of course, be in violation of the neutrality laws; and our President, then Martin Van Buren, made conscientious efforts to enforce these laws, but it appears that these efforts were not always very effective. Among other things, the insurgents had chartered an American steamboat called the "Caroline," which was used to ply between the American and Canadian shores for the purpose of supplying any needed military equipment.

The Canadian government naturally felt the necessity of putting a stop to the hostile acts in which the "Caroline" was engaged. Accordingly, on the night of December 29, 1837, a military force was sent out by the Canadian authorities to destroy this vessel, which was supposed to be moored at Navy Island, that

is, within Canadian territory. But the captain of the "Caroline," in order to ensure the safety of his vessel and the crew, had taken the precaution to retire to the American side, that is, within the territory of the State of New York and the jurisdiction of the United States. She was there discovered by the Canadian force, boarded, set on fire, and left to drift over the Niagara Falls. After this melée it was discovered that an American citizen (by the name of Durfee) was killed, shot through the head by a musket-ball—which fact betrayed the cause of his death. These were the simple facts which furnished the basis of a complicated controversy between Great Britain and the United States, and also between the United States government and the State of New York.

On receiving information of this affair, the American Secretary of State, Mr. Forsyth, addressed a note to the British Minister resident at Washington, Mr. Fox, alleging that "the destruction of property and the assassination of citizens of the United States on American soil had produced the most painful emotions of surprise and regret, and that the incident would be made the subject of a demand for redress."

In his reply to this note the British Minister, Mr. Fox, addressed a letter to Mr. Forsyth, setting forth the following points: (1) that it was admitted that the "Caroline" was destroyed by a Canadian military force under command of a British military officer; (2) that the business, however, in which the "Caroline" was engaged was clearly of a piratical character, which would of itself justify her destruction; (3) that the neutrality laws of the United States were not at the time enforced along the frontier so as to prevent Americans from engaging in hostile acts against the

British territory; and (4) that the destruction of the "Caroline," although taking place in American waters, was an act of self-defense and hence justifiable.

These claims of the British minister in justification of the alleged hostile act within American territory were not allowed by the United States government, and a formal demand for reparation was presented to the British government by the American minister at London. This letter was received and acknowledged by the British Minister of Foreign Affairs, Lord Palmerston, with a promise of due consideration.

§ 2. Jurisdiction Assumed by the State of New York

Thus far the case of the "Caroline" had been made simply a matter of discussion between the two national governments, and had not been complicated by any question regarding the rights of the State of New York, within whose territory the criminal act had been committed. If the act were regarded as merely a public act, authorized by the British government and under the direction of British military officers, it would then seem to involve a purely international question, namely, whether the territorial rights of the United States had been violated—which question would come entirely within the sphere of diplomatic negotiation. But if the act were looked upon as the criminal act of private persons, resulting in the destruction of private property and the murder of a private citizen, within the jurisdiction of the State, then the person or persons engaged in such a crime should evidently be held amenable to the laws of the State.

We thus see the dual aspect of the question growing

out of the destruction of the "Caroline,"—that presented to the Federal government, and that presented to the State government. The Federal government regarded the incident from the point of view of international law, as the invasion of American soil by British subjects and the commission of hostile acts within the jurisdiction of the United States, for which the British government should be held responsible. On the other hand, from the point of view of the State government, the acts committed by the persons engaged in the affair, were infringements upon the rights of life and property, which were under the protection of the laws of the State; and hence such persons should be subject to indictment and punishment according to the municipal law. But these persons could not, as a matter of fact, be reached by the State authorities, since they had already escaped to the Canadian border.

But, by a strange turn of events, an incident soon occurred which introduced a new feature into the case. The incident was this: A certain Canadian and British subject, by the name of McLeod, was in the habit of boasting that he was one of the destroyers of the "Caroline," and, to use his own refined language, that he had himself killed one of the "d——d Yankees." This boastful and offensive assertion served to inflame the excitement already existing in the State, and a popular demand was made to indict McLeod, and to punish him should he ever appear within the jurisdiction of the State authorities. Accordingly, in the spring of 1838, a grand jury of Niagara county, wherein the criminal act was committed, found a bill of indictment against McLeod for murder and arson. McLeod was then in Canada, and

had he remained there would never have been troubled about the indictment, and would have saved the government at Washington from a serious diplomatic embarrassment. But after three years subsequent to the destruction of the "Caroline," that is, in 1840, McLeod had the temerity to show himself on American soil, in the very county in which the indictment lay. He was there promptly arrested, lodged in jail and held for trial by the Niagara court of Sessions sitting at Lockport, N. Y. The State of New York thus assumed jurisdiction in the case of McLeod, who was held as a private person for a criminal act committed within the territory and against the laws of the State.

§ 3. The Plea of Non-liability by the United States

The arrest and imprisonment of Mr. McLeod brought a still further factor into the international controversy. It was three years before this time that the United States had made the demand upon the British government for reparation, on account of the violation of American territory. But up to this time no reply to this demand had been received from Great Britain; nor had the British government yet made a distinct avowal that it had assumed the responsibility of the hostile acts committed by the "Caroline." But the detention of a British subject by an American authority changed the entire aspect of affairs. Instead of the United States as heretofore, Great Britain now became the aggrieved party, and a demand was immediately made for the release of Mr. McLeod.

This demand was formally expressed in a note, dated December 13, 1840, sent to the American Sec-

retary of State, Mr. Forsyth, by the British minister at Washington, Mr. Fox, containing these words: "I feel it my duty to call upon the government of the United States to take prompt and effectual steps for the release of McLeod. It is well known that the destruction of the 'Caroline' it was a public act of persons in her Majesty's service, obeying orders of their superior authorities. The act, therefore, according to the usage of nations, can only be the subject of discussion between the two national governments; it cannot justly be made the ground of legal proceedings against the individuals concerned, who were bound to obey the authorities appointed by their own government." Mr. Fox also referred to the previous remonstrance of the United States against the hostile acts of the "Caroline," and to the fact that this is "still a pending subject of diplomatic discussion between her Majesty's government and the United States legation at London."

A prompt reply was made to this demand for the release of McLeod by the Secretary of State, Mr. Forsyth. This reply is especially significant as setting forth the position of the United States in respect to the relative authority of the Federal courts and the State courts, and claiming, in the present instance, the exemption from liability on the part of the Federal government. Mr. Forsyth wrote: "The jurisdiction of the several states which constitute the Union is within its appropriate sphere perfectly independent of the Federal government. The offense with which Mr. McLeod is charged was committed within the territory and against the laws of the State of New York, and is one that comes clearly within the competency of her tribunals. It does not, therefore, present the

occasion where, under the Constitution and laws of the Union, the interposition called for should be proper, or for which a warrant can be found in the powers with which the federal executive is vested. . . . The transaction out of which the question arises, presents the case of a most unjustifiable invasion, in time of peace, of a portion of the territory of the United States by a band of armed men from the adjacent territory of Canada. . . . The President is not aware of any principle of international law, or, indeed, of reason or justice, which entitles such offenders to impunity before the tribunals, when coming voluntarily within their independent and undoubted jurisdiction." Mr. Forsyth also calls attention to the fact that no authenticated statement has yet been received from the British government to the effect that the destruction of the "Caroline" was a public act for which the British government holds itself responsible; and whether such is the case or not, will be determined by the State court. (House Ex. Doc., 33, 26th Cong., 2d Sess.)

These explicit statements of Mr. Forsyth seem to lead to the following remarkable conclusions: (1) That the independent jurisdiction of the state courts may extend to matters which affect the international relations of the United States, even though the settlement of such matters is the legitimate function of the Federal government; (2) that the Federal government is unauthorized to act in such a case as the present, and may even plead "non-liability" in the matter of an international offense when committed within the territory of a state; and (3) that a question of international law which has already been brought within the field of diplomatic action and involves the rela-

tions between the United States and a foreign power, may be finally decided, not by the Federal, but by a State authority.

Whether the position taken by Mr. Forsyth was justified by the provisions of the Federal constitution, it is not for us at present to inquire. But whether it met with the approval of the British government, and was accepted as a principle of international law, will appear in the next step of the diplomatic controversy. In the meantime by the retirement of Mr. Van Buren from the presidency, Mr. Forsyth was succeeded by Daniel Webster as Secretary of State.

§ 4. The Threat of War by the British Government

At this time the British feeling toward the United States had become exceedingly bitter and belligerent. The pride of Great Britain in the protection of her own citizens abroad was thoroughly aroused. An historian of this period says that "the arrest of McLeod on the charge of murder awakened all the dormant distrust with which England regarded the United States, and war was imminent." Webster was informed by a distinguished Englishman, Sir Vernon Harcourt, that "there was but one feeling in England on the subject among all parties and ranks; if McLeod should be condemned, it would be such an outrage upon international justice that the scabbard must be thrown away at once." In order to put Mr. Webster on his guard the American minister at Paris wrote to him the day after he was installed in his new office, as follows: "I suppose that you are aware of the instructions given by the British ministry to

their minister at Washington. The subject is no secret here, and was spoken to me by one who knows. If McLeod is executed the minister is to leave the United States. It is the *casus belli*." But more significant than all this, Lord Palmerston, the British Foreign Minister, informed the American minister at London that McLeod's execution would be a signal for war.

We have already seen the views of Mr. Forsyth as to the non-liability of the Federal government to assume jurisdiction over a question of international law which had already come within the purview of a State court. Let us now see how foreign powers, and especially Great Britain, looked upon the propriety and justice of shifting a question of international liability from the government of the Federal Union to one of its constituent members. These views are contained in a note addressed by the British minister at Washington, Mr. Fox, to the new Secretary of State, Mr. Webster. After stating that the British government assumed the full responsibility for the destruction of the "Caroline," and claiming that the persons engaged in a public act under orders from their government cannot be held personally liable for such an act, Mr. Fox said:

"Neither can her Majesty's government admit for a moment the validity of the doctrine advanced by Mr. Forsyth that the Federal government of the United States has no power to interfere in the matter in question and that the decision thereof must rest solely and entirely with the State of New York. With the particulars of the compact which may exist between the several states that comprise the Union, foreign powers have nothing to do; the relation of foreign

powers are with the aggregated Union; that Union is represented to them by the Federal government; and to them the Federal government is the only organ. Therefore, when a foreign power has a redress to demand for a wrong done to it by any state of the Union, it is to the Federal government and not to the separate state, that such power must look for redress for that wrong. And such foreign power cannot admit the plea that the separate state is an independent body over which the Federal government has no control."

Mr. Fox goes on to say: "It is obvious that such a doctrine, if admitted, would lead to the dissolution of the Union, so far as its relations to foreign powers are concerned; and that foreign powers, in such a case, instead of crediting diplomatic agents to the Federal government, would send such agents, not to that government, but to the government of such separate state, and make their relations of peace and war with such state depend upon their separate intercourse with such state, without reference to the rest. Her Majesty's government apprehend that the above is not the conclusion to which the government of the United States intend to arrive; yet such is the conclusion to which the arguments of Mr. Forsyth necessarily lead."

"Be that as it may," Mr. Fox concludes, "her Majesty's government formally demand, on the general grounds already stated, the immediate release of Mr. McLeod, and her Majesty's government entreat the President of the United States to take into his most deliberate consideration the serious nature of the consequences which must ensue from a rejection of this demand."

The significance of this note, it is not difficult to

interpret. The British government proposed to hold the Federal government of the United States directly responsible, under the threat of war, for the imprisonment of one of its subjects, without regard to any plea of non-liability, based upon the internal structure of the Federal Union. Never before, or perhaps since, has the nation been so near the brink of war upon an international question involving the relative jurisdictions of the Federal and State authorities.

§ 5. Diplomatic Dilemma of the Secretary of State

Mr. Webster was now called upon to meet the whole issue which was joined with Great Britain, growing out of the destruction of the "Caroline" and the imprisonment of Mr. McLeod. The complicated problem presented to the new Secretary of State may perhaps be reduced to three main questions, namely: (1) Whether the destruction of the "Caroline" by an armed Canadian force in American waters was a violation of the territorial rights of the United States; and if so, whether such violation should be condoned on the plea of necessity and legitimate self-defense. (2) Whether the individual persons engaged in a public act under orders of their superior officers and for which public act their own government had assumed entire responsibility, can be held personally amenable to a judicial process. And (3) whether, under the existing Constitution and laws of the United States, the Federal government has the power to interfere in the judicial proceedings of a state court in a case involving an offence against a state, and when such case also involves a question of international law, the

decision of which may affect the international relations between the United States and a foreign power.

The last mentioned question was of the most pressing importance in view of the insistent demand of Great Britain for the immediate release of McLeod. Whether the Federal government possessed the legal authority to interfere in the proceedings of a state court must, of course, be determined by reference to the Constitution and to the laws of Congress. "The Constitution and all laws of the United States which shall be made in pursuance thereof" are declared to be "the supreme law of the land, and the judges in every state shall be bound thereby, anything in the Constitution or laws in any State to the contrary notwithstanding." (*Const.* Art. VI, sec. 2.) With reference to the Federal judiciary it is provided that "the judicial power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may, from time to time, ordain and establish." (*Ibid.*, Art. III, sec. 1.) The Constitution specifically defines the various kinds of cases over which the Supreme Court shall have jurisdiction; and among these there is no provision for such a case as the present one. It is evident that all the judicial power of the Federal government, not vested in the Supreme Court, must be provided for and apportioned among the inferior courts, ordained and established by Congress. In other words, the jurisdiction of the Federal inferior courts must be determined by Congressional legislation. In respect to the case before us it was found that Congress had made no law which justified the proposed interference with a state court. It was, therefore, evident to Mr. Webster that through the failure of proper Congressional legislation the

Federal government was without any authorized power to interfere for the release of Mr. McLeod. The humiliating fact was thus made clear that under the existing laws of Congress, the question whether the United States should or could accede to the imperative demand made by Great Britain, backed as it was by a threat of war, was solely within the jurisdiction of a state court.

In this delicate and embarrassing dilemma, Mr. Webster resorted to a most extraordinary procedure which, it is safe to say, was never employed before. As it was impossible to bring the case within the jurisdiction of the Federal courts, Mr. Webster determined to use all the skill and influence of the departments of State and Justice in assisting the counsel of Mr. McLeod to obtain the release of the prisoner through the procedure of the state courts. This could only be obtained either: (1) by a *nolle prosequi,* that is, an order to suspend further criminal proceedings, which order, at that time, could be issued only by the Governor of the State; or else (2) by a writ of *habeas corpus* issued by the Supreme Court of the State.

In order that there might be no further complications growing out of a disputed question of international law, Mr. Webster accepted the contention of the British minister, that individual persons engaged in a public act under public authority, are not themselves amenable to ordinary judicial procedure. He expressed his opinion in these words: "The government of the United States entertains no doubt that, after the avowal of the transaction as a public transaction authorized and undertaken by the British authorities, individuals concerned in it ought not, by the general usages of civilized states, to be holden re-

sponsible in the ordinary tribunals of law for their participation in it." (Mr. Webster to Mr. Fox, April 21, 1841.) This seemed to settle, once for all, the mooted question of international law, and to exclude it from all further consideration. At the time of making this concession, Mr. Webster assured the British minister that the case would now be easily disposed of by a writ of *habeas corpus,* and that "a tribunal so eminently distinguished for ability and learning as the Supreme Court of the State of New York, may be safely relied upon for the just and impartial administration of the law in this as well as other cases."

§ 6. The Federal Appeal to the State for Relief

After thus attempting to allay the importunity of the British government, Mr. Webster set to work to assist the counsel of McLeod to conduct the case before the state courts. He gave instructions to the Attorney-general of the United States as follows: "Having consulted with the Governor, you will proceed to Lockport, or wherever the trial may be holden, and furnish the prisoner's counsel with the evidence of which you may be in possession material to the case." And to emphasize the attitude of the Federal government in the matter he said to the Attorney-general: "You are well aware the President has no power to arrest the proceedings in the civil and criminal courts of the State of New York. If the indictment were pending in one of the courts of the United States, I am directed to say that the President, upon the receipt of Mr. Fox's last communication, would

have immediately directed a *nolle prosequi* to be entered." (Mr. Webster to the Attor. Gen., 1841.)

With these instructions the Attorney-general of the United States repaired to the State of New York on his strange mission—to appeal to the state authorities to relieve the Federal government from the difficulties growing out of a diplomatic controversy with a foreign power. The most summary way to solve the present difficulty would be to call upon the Governor to suspend further criminal proceedings by a *nolle prosequi,* which he had the legal power to do. But the Governor, who was at that time William H. Seward, refused to issue such an order, and complained that the Federal government's assistance in McLeod's defense was an "unwarrantable interference by Webster in the internal affairs of the State of New York." Thus it was that the efforts of the Attorney-general acting under the instructions of the Secretary of State, who was proceeding under the directions of the President of the United States, was at the outset balked by the Governor of the State.

There remained but one other resource, and that was to apply to the proper State court for the discharge of the prisoner upon a writ of *habeas corpus.* McLeod was therefore brought before the Supreme Court of the state. His discharge was sought on the ground that, even though he had any concern in the destruction of the "Caroline," he had acted therein as a soldier under orders from his superior officers in a military expedition, planned and authorized by the British colonial government of Canada, afterward avowed and sanctioned by the Queen's government in England. Therefore, the prisoner should be discharged from the custody of the State, not being amen-

able to judicial proceedings, and because the whole transaction in which he was engaged was a matter solely for international negotiation.

§ 7. Proceedings Before the New York Supreme Court

There are certain remarkable features in the proceedings before the New York Supreme Court which are worthy of special notice. In his argument before the court, the counsel for McLeod insisted that the prosecution of this case by the State involved certain undesirable results. He very pertinently said: "It seeks to make the municipal courts of New York exercise jurisdiction of the rights of nations. It deprives the national government of the power and control over foreign relations conferred upon it by the Constitution and drags the matter down to adjudication by the municipal laws of the State."

A single statement should here also be quoted from the argument of the counsel for the prosecution (the Attorney-general of the State)—which statement, though incidental to his own argument, is very significant and relevant to the main purpose of our present discussion. In the course of his argument he made this most apposite remark: "It is not my purpose to go into the question of the jurisdiction of the United States courts and the State courts. No doubt this would be a proper subject for United States legislation. Perhaps the Constitution is broad enough to cover a case of this kind, and therefore an act might be passed to declare which court, Circuit or District, should take jurisdiction. But no such law has been passed, and therefore no court of the United States

has jurisdiction of it." (25 Wendell's *Reports*, 531.) The learned counsel evidently meant to be understood by this statement that the reason why this case, involving important international relations, could not be tried before a Federal court was due not to any defect of the Constitution, but to the failure of proper Congressional legislation, which had been authorized by the Constitution.

But one of the most remarkable features of this remarkable case is yet to be mentioned. Almost the entire argument of the prosecuting counsel, as well as the opinion of the Court (together covering 119 pages of the twenty-fifth volume of Wendell's Reports), was devoted to an elaborate argument upon the very principle of international law which had now ceased to be a matter of controversy between the United States and Great Britain, namely, whether persons engaged in a public act under orders from their superior officers and for which their own government had assumed the sole responsibility, were personally amenable to judicial proceedings.

This was the specific point of international law which Mr. Webster had already conceded to the British minister in the interests of peace, and was no longer a matter of controversy between the two governments. But in spite of this fact, the learned Justice of the Supreme Court of the State of New York permitted this question of international law to be reopened, and upon its decision to depend the issue of the writ of *habeas corpus* and, consequently, the question of war with Great Britain; and the present counsel, who were accustomed to discuss questions of municipal law, were now called upon to enter the larger arena of international jurisprudence. Quota-

tions were freely made from the writings of the great publicists—Grotius, Vattel, Burlamaqui, Rutherford, Kent and others: the contending counsel, of course, arriving at opposite conclusions.

It will be remembered that Mr. Webster had assured the British minister that, on account of its great learning and ability, the Supreme Court of New York could be safely relied upon to render a just and impartial decision. What must have been his surprise and astonishment when this court not only permitted the reopening of the question that he had closed with Great Britain, but in its decision actually annulled the principle of international law which Mr. Webster had conceded to the British minister; the Court finding, contrary to the principle now accepted by both the contending governments, that persons engaged in a public act under the authority of their own government are not relieved from personal liability! The attempt to obtain the release of McLeod upon a writ of *habeas corpus* thus proved a failure. The last resort of the Federal government to avert the threatened war with England was now exhausted. The prisoner was remanded to jail to await his trial in the State Court on the original indictment found against him by the Grand jury of Niagara county.

§ 8. The Close of the Case and the Remaining Problem

The case had now reached a stage of almost tragic interest. The conviction and execution of McLeod by the authorities of the State of New York would, without the slightest doubt, be the signal for war between Great Britain and the United States. But from this

strain of intense anxiety, there followed a grateful relief, turning the tragedy into an almost comic dénouement. At the trial, which was now transferred from the Niagara court of sessions to the Supreme Court of the State, it was approved that McLeod was an adventurous and blustering braggart, fond of boasting of his imaginary exploits before a wondering crowd, and was not, in fact, either directly or indirectly, connected with the destruction of the "Caroline," and had nothing to do with the murder of the American citizen found dead at the time. On the plea and proof of an *alibi,* he was therefore discharged and ceased to be a factor in the judicial and diplomatic controversy.

With McLeod out of the way, the settlement of the "Caroline" affair proved to be a comparatively easy task. The British government acknowledged that the destruction of the vessel in American waters was a violation of the territory of the United States, and that an apology should have been made at the time. Mr. Webster accepted this apology, and admitted that there may have been some ground for the plea of self-defense;—laying down the principle, which was accepted by both parties, that the violation of territorial sovereignty might be justified on the ground of "a necessity of self-defense, instant, overwhelming, leaving no choice of means and no moment for deliberation." With these amenities the case of the "Caroline" was closed.

But while the diplomatic incident was closed, the acquittal of McLeod did not remove the legal difficulties which had so clearly been brought to light. It is sometimes supposed, and perhaps openly alleged—as was done by Secretary Forsyth, at the beginning of

this controversy—that with our dual system of Federal government, it is impossible for the Federal authorities to interfere with the judicial processes of a State court, even though the case may involve a question of international law and the possible interruption of the peaceful relations with a foreign power. The fallacy of this claim was clearly set forth by Mr. Fox, the British minister, in his reply to Mr. Forsyth. It was shown in his reply that the international liability of the United States to a foreign power cannot be affected by the federal structure of the American government.

Moreover, it has been seen that the inability of the Federal government to interfere with the jurisdiction of the State courts, in a case like the present one, is not due to our Federal system of government or to any essential defects in the Constitution. If the Constitution, in the distribution of judicial powers, has conferred upon Congress the authority to provide for such an emergency as that herein described, and Congress has failed to exercise the power delegated to it, then it is this branch of the government that is at fault, and not the Constitution. In the discussion of the McLeod case, the Attorney-general of the State was evidently correct when he gave as his opinion that "the Constitution is broad enough to cover a case of this kind, and an act of Congress might be passed to declare what court should take jurisdiction. But no such law has been passed, and therefore no court of the United States has jurisdiction of it."

It need hardly be said, in conclusion, that the principles we have considered have a far wider application than to the complicated state of affairs growing out of the destruction of the "Caroline" and the impris-

onment of McLeod. The facts of this case must create the conviction that whenever the international rights and duties of the United States are made the subject of diplomatic controversy, they ought not, as a matter of law and reason, to be determined by the judicial authority of a single State. But it is a painful fact that the United States government, in similar cases—as, for example, in the case of mob-violence against subject aliens—has been compelled to make the same humiliating plea of incompetence and non-liability, although the case we have considered seems to show that the apparent difficulties might be removed by appropriate Congressional legislation.

CHAPTER III

AMERICAN POLICY AS TO THE LAW OF RECOGNITION: APROPOS OF THE CUBAN REVOLT

One of the interesting incidents in the diplomatic history of the United States was that which attended the controversy with Spain, and which grew out of the popular insurrections in Cuba. At the beginning of this controversy, Cuba formed a part of the Spanish dominion and was legally subject to the Spanish authority. Dissatisfaction with this authority had led to frequent protests on the part of the Cuban people. The insurrections in which the United States became especially interested covered two somewhat distinct periods. The first period, known as the "Ten Years' War," extended from 1868 to 1878, and was marked by a cruel disregard of the rules of civilized warfare and a wanton disregard of American property. The second period, of less duration but of even greater cruelty, extended from 1895 to 1898. The first stage occurred during the administration of General Grant; the second stage during the presidency of Mr. McKinley.

§ 1. The Diplomatic Question in the American Congress

A marked feature of this controversy between the United States and Spain was the diversity of views

in the American Congress regarding the international questions involved. Special attention was paid to the legality of recognizing the insurgent population. Proposals were made in Congress to recognize the belligerency of the revolting people; and even congressional resolutions were submitted recognizing their status as an independent republic. On the 9th day of December, 1896, the following resolution was introduced into the United States Senate: *"Resolved,* That the independence of the republic of Cuba is hereby acknowledged by the United States of America; and that the United States will use its friendly offices to bring to a close the war between Spain and Cuba." On the 31st day of December this resolution was favorably reported by the Senate Committee on Foreign Relations.

The fact that such a resolution passed its initial stage in the legislature of the United States is suggestive of an important question of international law. The question suggested by this resolution is, whether the United States could, under the existing circumstances, recognize the independence of the insurgent population, and at the same time assume to maintain friendly relations with the Spanish government; in other words, whether the act contemplated by the resolution was a pacific act of recognition, or a hostile act of intervention.

The fundamental principle underlying the fabric of international law is the independence of sovereign states in their relation to one another. As a moral personality, every state is, of course, under obligation to rule justly and respect the rights of its own subjects. But as a legal personality, such a state is not subject to the dictation of other states, and is not

responsible to other states for its own government, so far as the rights of other states are not affected. On the contrary, every encroachment made upon its authority within its own domain, without its own consent, is an attack upon its sovereignty, and hence a violation of the fundamental principle of international law.

What may be the exceptional and aggravating circumstances that may ever justify the interference of one state with the internal government of another, may be a serious question. But however justifiable such an act of intervention may be as a matter of morals or expediency, it is strictly illegal; it cannot be justified as a matter of law, and may be resented by the state whose sovereign rights are thus invaded.

From the time of Vattel to the present day all publicists have emphasized the inviolability of a nation's sovereignty. "It is the evident consequence of the liberty and independence of nations," says Vattel, "that all have a right to be governed as they think proper, and that no state has the smallest right to interfere with the government of another. Of all the rights that belong to a nation, sovereignty is doubtless the most precious and that which other nations ought the most scrupulously to respect, if they would not do an injury. It does not then," continues this writer, "belong to any foreign power to set itself up as a judge of another sovereign's conduct and oblige him to alter it. If he loads his subjects with taxes, and if he treats them with severity, the nation alone is concerned in the business, and no other is called upon to oblige him to amend his conduct and follow more wise and equitable maxims." (*Law of Nations,* Bk. II, ch. 4.)

It becomes, then, a matter of great importance whether an act of recognition on the part of one state does or does not infringe upon the rights of sovereignty belonging to another. The controversy, or at least the indecision, that arose among our law-makers at the time of the Cuban revolution, we may take as a sufficient reason for reviewing the general law of recognition, as it is accepted by publicists and embodied in the practice of nations, especially by the United States.

It may not seem necessary to say, at the outset, that the word "recognition," as used in the law, has a meaning not very different from that used in ordinary language, as the perception of something that actually exists as a fact. It is a principle of reason as well as of law, that recognition can properly be taken only of what exists as a fact. To profess to recognize as a fact that which is not a fact, is a misuse of language as well as a perversion of law. For one state, under the name of "recognition," to interfere with the actual course of events in another, is an infringement upon the sovereignty of that other state. But if changes have *actually* taken place in a foreign nation that affect its existing government or its political authority, such changes may be recognized, when and only when they become accomplished facts.

International law takes account of three general forms of recognition, and determines the state of facts, under each form, that justifies such recognition, without violating the sovereignty of the nation which is affected. These forms of legal recognition are: (1) the recognition of a new government; (2) the recognition of belligerency; and (3) the recognition of independence.

§ 2. Recognition of a New Form of Government

We may then, in the first place, consider the case in which a nation sees fit to change its own form of government and adopt a new form. If such a change takes place within the limits of a sovereign state, and does not affect the interests of other states, it is proper to recognize it without inquiry as to the antecedent causes which have brought it about, provided only it is an accomplished fact. Such a change is a matter solely within the jurisdiction of the state itself, with which other states have nothing to do. Other states have no judicial authority to investigate into the justice or expediency or other reasons, which concern only the nation itself.

This principle has uniformly been adopted by the United States in dealing with other nations. It has been necessary, from very early times, for our government to announce its policy in this respect, especially in view of the frequent changes of government which have taken place in France since the French Revolution. With the establishment of the First Republic in 1792, Thomas Jefferson, who was Secretary of State under Wasington, writing to our minister at Paris (Nov. 7, 1792), said: "It accords with our principles to acknowledge any government to be rightful which is formed by the will of the nation, substantially expressed." And again (March 12, 1793): "We surely cannot deny to any nation that right whereon our own government is founded—that every one may govern itself according to whatever form it pleases, and change these forms according to its own will; and that it may transact its business with foreign nations through whatever organ it thinks

proper, whether king, convention, assembly, committee, president or anything else it may choose. (Moore's *Digest* of *Int. Law,* I, p. 120.)

This principle was followed in the many subsequent changes that took place in France. It was followed at the establishment of the First Empire under Napoleon in 1804. It was also followed upon the abdication of Napoleon and the restoration of the monarchy under Louis XVIII in 1814. It was not departed from at the time of the Revolution of 1830 when Louis Philippe became king of the French. With the establishment of the Second Republic in 1848, Mr. Buchanan, while Secretary of State, transmitted to the American minister at Paris a letter of credence (March 31, 1848) with these words: "In its intercourse with foreign nations the government of the United States has, from its origin, always recognized *de facto* governments. We recognize the right of all nations to create and reform their political institutions according to their own will and pleasure. We do not go behind the existing government, to involve ourselves in the question of legitimacy. It is enough for us to know that a government exists capable of maintaining itself, and then its recognition on our part inevitably follows." (*Ibid.,* I, pp. 122-124.)

While Mr. Webster was Secretary of State another political change took place in France, whereby, in December, 1851, the Second Republic was transformed into the Second Empire under Louis Napoleon, who took the title of Napoleon III. Almost immediately after this event, Mr. Webster wrote to the American minister at Paris (Jan. 12, 1852) as follows: "From President Washington's time down to the present day, it has been a principle acknowledged

by the United States, that every nation possesses the right to govern itself according to its own will, to change its institutions, and to transact its business through whatever agents it may think proper to employ. . . . If the French people have substantially made another change, we have no choice but to acknowledge that also." (*Ibid.*, I, p. 126.)

We are fortunately obliged to record only one further important change of the French government, and that is the establishment of the Third Republic in 1870, at the close of the Franco-Prussian War. At that time, the minister of the United States at Paris, Mr. Washburne, received the following instructions (Sept. 6, 1870): "If provisional government has actual control and possession of power and is acknowledged by the French people, so as to be, in point of fact, *de facto* government, of which you will be able to decide by the time this reaches you, you will not hesitate to acknowledge it." (*Ibid.*, I, 127.)

The attitude of the United States in respect to the matter of recognition as applied to the successive governments of France, seems clearly to show that such governments may be recognized, without any inquiry as to their justice or expediency or the antecedent causes of their adoption, or the prospect of their endurance.

There is, however, one condition that seems to have been assumed in the case of France, namely, that the new governments were really *de facto,* that is, actually approved by the French people. Such a condition seems to have acquired a special importance in connection with the revolutionary governments of South and Central America. The frequency of such revolutions in these countries has sometimes made it dif-

ficult to decide which of two rival governments actually holds the reins of power. The question arises in such a case, not which as a matter of right and justice is the *de jure* government, but which as a matter of evidence is the *de facto* government. It has not been the policy of the United States to go back of existing conditions and involve itself in a judicial investigation as to what government *ought* to be supreme, but to consider what government *is* supreme. Here, as in all other cases, the recognition must be based upon fact, and not upon opinion.

One or two examples only will be sufficient to illustrate this point. In the case of a revolutionary disturbance in Nicaragua, President Pierce fully explained this principle in a special message to Congress (March 15, 1856). He said: "It is the established policy of the United States to recognize all governments without question of their source, or organization, or of the means by which the governing persons attained their power, provided there be a government *de facto,* accepted by the people of the country. We do not go behind the fact of a foreign government's exercising actual power, to investigate questions of legitimacy; we do not inquire into the causes which led to a change of government. All these matters we leave to the people and the public authorities to determine. . . . It is the more imperatively necessary to apply this rule to the Spanish American republics, in consideration of the frequent and not seldom anomalous changes of organization or administration which they undergo, and the revolutionary nature of most of the changes." (*Ibid.,* I, p. 142.) This principle was also most clearly laid down by Dr. David Jayne Hill, when Acting Secretary of State, in the

case of Colombia (Sept. 8, 1900). Dr. Hill sent to the United States minister at Bogota the following instruction: "The policy of the United States announced and practiced upon occasion for more than a century, has been to refrain from acting upon conflicting claims to the *de jure* control of the executive power of a foreign state; but to base the recognition of a foreign government solely on its *de facto* control to hold the reins of administrative power." (*Ibid.*, I, p. 139.)

We may then conclude that, in accordance with the practice of the United States as seen in the cases of France and the Spanish-American republics, a new government may be recognized, without inquiring into the causes of its adoption, and without interfering with the sovereignty of the state itself, provided the new government is *de facto,* or actually established.

§ 3. Recognition of a Belligerent Community

When we come, however, to consider the matter relating to the "recognition of belligerency" we encounter a more serious problem. Belligerency is, properly speaking, the status that independent and sovereign nations assume with reference to one another, when engaged in war. Such independent nations, by the very fact of their being engaged in war, acquire certain specified rights and also become subject to certain specified obligations, which are sanctioned by the rules of international law. Such nations do not require any "recognition" as belligerents; they are already invested with that status by the "laws of war."

But in the case of an insurgent community, engaged

in a professed, or even an actual, war with a parent community, it is a far different matter. If such a community wish to exercise the rights that belong to belligerents, they must be "recognized" as entitled to such rights by some foreign independent state or states. The recognition of belligerency in such a case, as Professor Lawrence says, "does not confer upon the community recognized all the rights of an independent state; but it grants to its government and subjects the rights and imposes upon them the obligations of an independent state in all matters relating to war." (Lawrence, *Principles of Int. Law*, p. 303.)

Since the recognition of belligerency may be of such advantage to the insurgent community, it is important to know the conditions upon which such recognition is regarded as legally justifiable. If these conditions exist, the recognition is not considered as infringing upon the sovereignty of the parent government. If they do not exist, the recognition is considered as not justified, but as a "gratuitous demonstration of moral support to the rebellion." The conditions, then, which are regarded as justifying the recognition of belligerency may be indicated as follows: (1) the insurgents must have a *de facto* political organization, with an efficient and responsible government; (2) the conflict must have reached the stage of actual warfare in the sense of international law; and (3) the interests of the recognizing power must be so affected as to indicate the need of self-protection.

(1) The first condition that we notice is the possession on the part of the insurgents of an efficient and responsible government capable of controlling the acts of its subjects. Without such a government, the insurgent population can be regarded only as a body

of lawless rebels, with which no foreign government could come into any relations. However extensive the insurrection may be, its acts can be considered in no other light than those of any class of law-breakers or criminals. With an effective government, however, they may be dealt with as an organized body, and held amenable for their acts by a responsible authority. The existence of such an authority is made evident by the possession of a definite seat of government, from which such authority proceeds and is enforced.

The absence of any such definite political organization was one of the several reasons that led President Grant in 1870 to oppose the recognition of the Cuban insurgents in their revolt against the Spanish government. In his special and well-considered message to Congress on this subject (June 13, 1870)—evidently inspired by his Secretary of State, Hamilton Fish—President Grant used these words: "The question of belligerency is one of fact, not to be decided by sympathies for or prejudices against either party. . . . To justify a recognition of belligerency, there must be above all a *de facto* political organization sufficient in character and resources to constitute it, if left to itself, a state among nations capable of discharging the duties of a state, and of meeting the just responsibilities it may incur as such toward other powers in the discharge of its national duties."

In his seventh annual message submitted to Congress (Dec. 7, 1875) President Grant also emphasized the point we are now considering. He said: "I fail to find in the insurrection the existence of such a substantial political organization, real, palpable, and manifest to the world, having the forms and capable

of the ordinary functions of government toward its own people and to other states, with courts for the administration of justice, with a local habitation, possessing such organization of force, such material, such occupation of territory, as to take the contest out of the category of a mere rebellious insurrection." (Moore's *Digest,* I, pp. 194, 195.)

During the second period of the Cuban revolt, President McKinley, in his annual message (Dec. 6, 1897) in referring to the "wise utterances of President Grant in his memorable message of December 7, 1875," and calling attention to the questionable resolutions of Congress in the Spring of 1896—took occasion to say: "Recognition of the belligerency of the Cuban insurgents has often been canvassed as a possible, if not inevitable step, both in regard to the ten years' struggle and during the present war. I am not unmindful that the two Houses of Congress in the Spring of 1896 expressed the opinion by concurrent resolution that a condition of public war existed requiring or justifying the recognition of a state of belligerency in Cuba, and during the extra session the Senate voted a joint resolution of like import. In the presence of these significant expressions of the sentiment of the legislative branch, it behooves the Executive to soberly consider the conditions under which so important a measure must rest for justification. It is to be seriously considered whether the Cuban insurrection possesses beyond dispute the attributes of statehood, which alone can demand the recognition in its favor." (Moore's *Digest,* I, p. 198.)

(2) In addition to the condition just noticed—that the insurgent community must possess an efficient and responsible government, capable of exercising the au-

thority and fulfilling the duties of statehood—there is another condition quite as important and perhaps even more obvious. This condition relates to the conduct of military operations, which must have attained the character of an actual war. We have seen that recognition, to be valid, must be the recognition of a fact. Hence, the recognition of belligerency requires, as its essential condition, the fact of belligerency. Although the recognition of belligerency applies, in a certain sense, to the whole insurgent community, still it only confers those rights and imposes those duties which are incident to lawful warfare. To become recognized as belligerents the community must have reached a stage in which they are conducting their military operations in accordance with the accepted laws and customs of war. The mere fact that fighting is going on, though fierce and protracted, does not constitute war in the international sense. Such fighting may be due to the uprising of a mob, or to a riotous demonstration, or even to a popular revolution; but it may not, and usually does not, possess the character of legitimate warfare. To be a war in the international sense, it must be conducted according to the rules and methods laid down by the "Law of Nations." The armies must be so organized and controlled that they may be properly characterized as lawful belligerents.

The question as to who are "lawful belligerents" may, perhaps, best be answered in the terms of the Hague "Regulations respecting the Laws and Customs of War"—which, by the way, were adopted from the Brussels Declaration of 1871. According to these statements, belligerents to be lawful are required: "to be commanded by a person responsible for his subordinates—to have a distinctive emblem recognizable

at a distance—to carry arms openly—to conduct their operations in accordance with the laws and customs of war." (Hague Regulations, Sec. I, "Belligerents," Art. 1.) The laws and customs of war are very explicit regarding what may, and what may not, be done by armed forces. They must be properly organized and under proper officers and use proper instruments of war; they must properly treat their prisoners taken on the field, and must give quarter to those who have surrendered; they must respect the rights of non-combatants, the sick and wounded; and they are subject to many other restrictions which are supposed to be prompted by the spirit of humanity.

If the insurgent community conforms to the rules laid down by the laws of war, it may be regarded as engaged in legitimate warfare and, so far as their military status is concerned, entitled to recognition. In such a case, to use the words of Professor Lawrence: "Its armies are lawful belligerents, not banditti: its ships of war are lawful cruisers, not pirates; the supplies it takes from invaded territory are requisitions, not robbery; and at sea its captures made in accordance with maritime law are good prizes, and its blockades must be respected." (Lawrence, *Principles*, p. 78.) But if the insurgent community does not conform to the military duties imposed by the law of nations, it cannot claim the belligerent rights belonging to an independent state. It is still regarded by foreign nations as a rebellious people and not entitled to recognition. It was for this reason, among others, that both President Grant and President McKinley refused to recognize the Cuban insurgents, in spite of the favorable resolutions by the American Congress. It may be observed, in this connection, that the Chief

Executive, as the representative of the country, in foreign relations, has alone the final authority to decide in the matter of recognition.

(3) Besides the conditions already noticed—namely, that the insurgents should have a political organization capable of performing the duties of a state, and should be conducting the war according to the rules prescribed by international law—there is a further condition to be observed by the recognizing power. It is necessary that the hostilities should be of such a character as to affect, in some way, the rights and interests of the recognizing state. Otherwise, if the recognition is intended merely to give support to the insurgents, and not to protect the rights of outside nations, it partakes more of the character of intervention than of simple recognition.

The great importance which attaches to this third condition will be apparent when we consider the theory of the law upon which alone the recognition of belligerency can be regarded as legally justifiable. It is true that every sovereign state has normally the right to govern its own subjects as it thinks best, and to maintain its own authority as best it can; and that no other state has a legal right to interfere with what belongs exclusively to its internal government. But if in the exercise of its authority it disturbs international relations; if it provokes an insurrection of such magnitude and effect as to convert the normal relations of peace into the abnormal relations of war; if the rights and interests of foreign nations become seriously affected by such disturbance,—then foreign nations have a right to protect themselves by recognizing the facts as they exist and to adjust their conduct to the new state of things.

This condition is strongly insisted upon by eminent authorities, of whom we may cite a few examples: "On the outbreak of a rebellion or insurrection in any country," says Mr. Boyd, the English editor of Wheaton, "it is the *prima facie* duty of foreign states to take no part in the matter, and to allow events to take their own course. But the facts in the case often render it necessary for other nations to take cognizance of the existence of the insurrection. When countries are intimately connected with each other through situation or commerce, a revolt of any magnitude in one materially affects the rights and interests of the others and entails upon them the necessity of pursuing some definite course of conduct toward the disturbed state." (Boyd's "Wheaton," § 27, a.)

To illustrate the extent to which foreign nations may be affected by such a disturbance, Mr. Creasy says: "Their subjects must necessarily have dealings with the revolutionary or insurgent party in the disturbed state; and in the case of maritime nations, the complications as to jural rights and liabilities by their intercourse, or by acts of violence committed by armed partisans and armed ships, become more and more embarrassing. If the conflict among the opposite parties in the disturbed state is brief and especially if the old government speedily re-establishes its authority, the difficulty imposed upon foreign nations is trifling. They have but to wait a little, and some degree of inactive patience is always proper. But if the conflict assume formidable proportions and lasts long, if it becomes civil war and not merely a local tumult, the duties of other states toward their own subjects (to pass by other reasons) require the rulers of those

other states to pursue a different line of conduct." (Creasy, *First Platform of Int. Law*, p. 670.)

From the foregoing propositions it may be inferred that the purpose of recognition is not to infringe upon the sovereignty of any state. It is not to remedy a wrong which may exist within the limits of the disturbed state, but to maintain the rights of the recognizing state which are affected by such disturbance. If, therefore, there is no disturbance of the rights of any foreign nation resulting from the hostilities between the parent government and the insurgents, there is no adequate ground for recognition.

So important is this condition that it is often regarded as the most essential, and even the sole, fact upon which the recognition of belligerency is finally justified. Mr. Dana, to whose well-known note to Wheaton we have already referred, says: "The reason which requires and which can alone justify this step by the government of another country, is that its own rights and interests are so far affected as to require a definition of its own relation to the parties. When a parent government is seeking to subdue an insurrection by municipal force, and the insurgents claim a political nationality and belligerent rights which the parent government does not concede, the recognition by a foreign state of full belligerent rights, if not justified by necessity, is a gratuitous demonstration of moral support to the rebellion and of censure upon the parent government." (Dana's "Wheaton," § 23, note.) And Mr. Hall, one of the most eminent English authorities on international law, says to the same effect: "The right to recognize the belligerency of insurgent subjects of another state must then, for the purposes of international law, be based solely upon

a possibility that its interests may be so affected by the existence of hostilities in which one party is not in the enjoyment of belligerent privileges, as to make recognition a reasonable measure of self-protection." (Hall, *Int. Law*, 4th Ed., p. 35.)

As an historical example of justifiable recognition may be cited the recognition by England of the belligerency of the Confederate States in 1861. This recognition was granted by the Queen's Proclamation of Neutrality on May 14, 1861. As neutrality involves an existing state of war, the issue of such a proclamation assumed that an actual war then existed between the Federal government and the seceding States, and, hence, it recognized the insurgent community as entitled to belligerent rights.

All the conditions necessary to justify recognition seem to have been fulfilled. The seceded States evidently had a political organization with an established seat of government, a responsible executive and an elective legislative body. They also had organized armies under competent officers and were conducting hostilities in accordance with the laws of war. The interests of England, furthermore, were certainly threatened by the hostilities taking place on American soil. The only question which might arise was whether the conflict had reached the stage of actual warfare at the time the Queen's Proclamation was issued on May 14, 1861. This question could only be settled by appealing to the facts in the case.

The facts were these: On the 12th day of April, 1861, actual hostilities began with the bombardment of Fort Sumter by the Confederate forces. On the 15th of the same month the President of the United States called for a large force (75,000 men) of the

militia of the States to suppress the rebellion. On April 17th the President of the Confederate States issued a proclamation inviting application for letters of marque and reprisal, indicating that hostilities would be extended to the sea—which would still further threaten the commercial interests of England. But more important than all, President Lincoln on April 19th issued a Proclamation announcing the coasts of the seceded States to be under blockade, and declaring that "he deemed it advisable to set on foot a blockade in pursuance of the laws of the United States and the law of nations."

In view of these facts it was claimed by Earl Russell, the English Minister of Foreign Affairs, that "the extent, the organization and acts of the insurgent population as well as the institution of a blockade by President Lincoln were evidences that war actually existed, and that the commercial interests of England required a definition of the attitude which she assumed with reference to the conflict." Intelligence of this blockade reached London on May 2, 1861, nearly two weeks before the issue of the Queen's Proclamation of May 14th, and nearly two weeks after the President's Proclamation of April 19th—so that there could be no adequate ground for controversy as to the relative priority of these two acts.

It is worthy of notice in this connection that the Supreme Court of the United States, in reviewing the validity of certain maritime captures made after April 19th decided that the President had a right *jure belli* to institute a blockade of the ports in the possesion of the seceded States and that blockade was an act of war. "It seems then," says President Woolsey, "that if the British government erred in thinking that the

war began as early as Mr. Lincoln's proclamation in question, they erred in company with our Supreme Court." (Woolsey, *Int. Law,* 304.) The closing of the Southern ports by a blockade has almost uniformly been accepted by international jurists as the decisive fact which gave legal justification to the act of England. In summing up this controversy, Bluntschli said: "All the world was of one opinion that there was war, and that in this war there were two belligerent parties. And this was precisely what the government of England assumed in recognizing the Confederacy as a belligerent power. I do not see any injustice, any violation of the law, to the detriment to the Union." (Bluntschli, *Rev. de Droit Int.,* II, 462.)

From this brief review of the law and practice of nations it may be concluded that the recognition of belligerency is justifiable when and only when: (1) The insurgent population is organized under a *de facto* government, exercising a real authority over its subjects, and capable of fulfilling its international obligations; (2) the hostilities between the parent government and the insurgents are of such magnitude and so conducted as to be an actual war in the sense of international law; and (3) the contest so affects the rights and interests of the recognizing power as to render the act of recognition substantially a measure of self-protection.

§ 4. Recognition of Independence under the Law

The recognition of independence presents quite a different problem from that of belligerency; its purpose is entirely different, and the conditions upon

which it is justified are also quite different. The recognition of independence has for its object the admission of a new state into the family of nations. By "the family of nations" is meant that body of independent and sovereign states which are bound together by the customary or prescribed rules of international law. The primary purpose of such an international society is to maintain among themselves, on terms of equality, the legalized rights and duties which they possess as sovereign states. They may, of course, by concerted action, without infringing upon the sovereign rights of any one of their members, admit an outside existing nation into the privileges of their society; as was done in the case of Turkey by the Treaty of Paris in 1856. There are other cases of a similar kind, for example, the cases of Persia, China and Japan.

But such are not the cases to which the law relating to the recognition of independence is more usually applied. It generally relates to the case in which an insurgent community has risen in revolt against a sovereign power, and claims for itself the right to be recognized as an independent state. It will be seen, in such a case, there are involved two conflicting and antagonistic claims—on the one hand, the claim on the part of the previously existing sovereign state that its independence and sovereignty be maintained; and, on the other hand, the claim on the part of the insurgent community that it be recognized as a new independent and sovereign state. It is for the recognizing power to decide between these conflicting claims. In deciding this complex question, it must always be assumed as a principle of law that no international act can be regarded as strictly legal that infringes

upon the existing sovereignty of any independent state.

The difficulty arising from such a situation may be seen by reverting to the resolution submitted to the United States Senate in 1896, when the recognition of the independence of the Cuban insurgents was in question. This resolution provided: first, that the independence of the republic of Cuba be acknowledged by the United States of America; and, secondly, that the United States use its friendly offices to bring to a close the war between Spain and Cuba. The query then arose whether the act contemplated by the resolution was in reality a pacific and strictly legal act of recognition, or whether it was a non-pacific and strictly illegal act of intervention.

We may then consider first the case in which the law provides the mode in which the independence of an insurgent community may be recognized without infringing upon the actual sovereignty of the parent government.

In approaching this case we should keep in mind the essential principle upon which all forms of recognition must be based; that is, they must be based solely upon ascertainable facts. This was seen to be true in regard to the recognition of a new government, and also in regard to the recognition of belligerency. It is equally true in regard to the recognition of independence. There must be *de facto* independence before it can be recognized as such by any foreign state. It follows, then, that the recognition of independence, to be legal, rests upon the actual facts of independence and sovereignty. Hence, it requires the fulfilment of two distinct and ascertainable conditions. These conditions are: (1) the acquisition of *de facto*

sovereignty on the part of the insurgent community; and (2) the cessation or loss of *de facto* sovereignty on the part of the parent government.

(1) The acquisition of *de facto* sovereignty on the part of the insurgent community is evident from the fact that it already possesses the attributes of a state, a political organization capable of exercising the authority and fulfilling the duties of statehood. It must have an efficient and responsible government with a definite seat of authority. It must have a subject population yielding voluntary obedience to that government. It must also have a practically well-defined territory over which its authority extends. It must, finally, be capable of assuming international relations and of fulfilling its duties to other states. It may under these conditions be recognized as possessing the requisites of statehood.

(2) The cessation or loss of *de facto* sovereignty on the part of the parent government is evident from the fact that it has virtually abandoned all efforts to maintain its authority over the people in revolt. When a state ceases to use its available means to reduce to subjection any part of its rebellious population, it may be presumed that its sovereignty, to that extent, has ceased to exist. The maintenance of its authority depends, in the last analysis, upon its ability to employ an armed force to suppress a rebellion against its government and laws. As long as a state is actively engaged in maintaining its authority, the question of supremacy remains in doubt. But when it has abandoned all efforts to uphold its own authority within a certain district, its actual sovereignty within that district may properly be regarded as having ceased.

Where the above conditions have been fulfilled, the

de facto sovereignty of the parent government may properly be considered as having passed away, being replaced by the *de facto* sovereignty of the insurgent community. It was the absence of both of these facts, at the time of the Cuban revolt, that compelled the American government to refuse to recognize the independence of the so-called republic of Cuba.

These rules of law have uniformly been accepted by international jurists. President Woolsey says: "It is a safe rule in contests involving the violent separation of a state into parts that when the mother country gives up active efforts to restore the old order of things by war, other states may regard the revolution as perfected and a new state as having come into existence." (Woolsey, *Int. Law,* p. 41.) Mr. Hall says: "Definitive independence cannot be held to be established, and recognition is consequently not legitimate, as long as a substantial struggle is maintained by the former sovereign state for the recovery of his authority." (Hall, *Int. Law,* p. 92.) And Professor Lawrence states the case as follows: "The most frequent case of admission into the society formed by civilized states is when a political community . . . receives recognition of independence from other states. The community thus recognized must possess a fixed territory within which an organized government rules in civilized fashion, commanding obedience of its citizens. The act of recognition is quite compatible with the maintenance of peaceful intercourse with the mother country, if it is not performed till the contest is either actually or virtually over in favor of the new community." (Lawrence, *Principles of Int. Law,* p. 87.)

The history of the last century affords abundant

evidence of the practice of nations in this respect. The recognition of the South American republics presents the most notable examples of this practice. Neither the United States nor Great Britain recognized the independence of the Spanish colonies until it was clearly evident that Spain had actually abandoned her struggle for supremacy. In fact, the sovereignty of Spain was not questioned or interfered with as long as she was making active efforts to maintain her authority. The insurrections in Spanish America broke out in 1810. The struggle was carried on for several years with varying prospects of success. In Buenos Ayres and Colombia the mother country at last abandoned all efforts to re-establish her authority by arms. In Peru, Chili and Mexico the struggle was carried on somewhat longer, until the authority of Spain was neutralized and hostilities practically ceased.

In spite of the deep sympathy cherished by the American people for the oppressed colonies, the government of the United States clung to its time-honored policy of neutrality. In 1816 Mr. John Quincy Adams, then Secretary of State, wrote to President Monroe: "I am satisfied that the cause of the South Americans, so far as it consists in the assertion of their independence against Spain, is *just*. But the justice of a cause, however it may enlist individual feelings in its favor, is not sufficient to justify third parties in siding with it. The fact and the right combined can alone authorize a neutral to acknowledge a new and disputed sovereignty." (Moore's *Digest*, I, p. 78.) It was not until the war had practically ceased and Spain had virtually given up the contest that in 1822 a resolution was introduced into Congress to acknowledge the independence of Mexico and

the South American republics. The Senate Committee on Foreign Relations, which reported in favor of this resolution, affirmed in its report the principle that "the political right of the United States to acknowledge the independence of the South American republics, without offending others, does not depend upon the justice, but upon the actual establishment of that independence." (Hall, *Int. Law*, p. 90.)

The recognition of the independence of these states by Great Britain was somewhat more tardy, but was governed by the same principles. Not until 1824 was serious attention given to this matter by English statesmen. In that year Sir James Mackintosh made his famous speech "On the Recognition of the Spanish American States," delivered in the House of Commons, strongly urging the cause of the insurgents. In this speech he said: "The fact of independence is now the sole object of consideration. If there be no independence, we cannot acknowledge it; if there is, we must." His whole argument was based upon the fact that the struggle for supremacy had practically ceased, and that the colonies were *de facto* independent. (Mackintosh, *Miscellaneous Works*, Ed. Lond., 1851, p. 760.) The principle thus stated seemed to guide the action of the British government in this matter of recognition. Lord Liverpool said that he "could not reconcile his mind to take such a step so long as the struggle in arms continued." Mr. Canning expressed as his own opinion that "where a doubtful and *bona fide* struggle for supremacy is still maintained by the sovereign power, the insurgents cannot be said to have established a *de facto* independence."

The recognition of the independence of Texas by

the United States may furnish us with another example in point. In 1835 Texas revolted from Mexico and formed a provisional government. A war followed, which in 1836 resulted in the defeat of the Mexican army and the capture of the Mexican President, Santa Anna. In the same year Texas declared her independence and adopted a republican government. The question of recognition was presented to the United States. As Mexico was, under her new president, making some show of renewing hostilities, President Jackson sent a message to Congress advising delay until the issue of the threatened invasion should be decided. No immediate action was therefore taken by the United States. But as no further attempt was made by Mexico to subdue the province, its independence was recognized in the following year, 1837. (See Moore's *Digest,* I, pp. 90-103.)

Another occasion for defining the principles of international law upon this subject, arose in Great Britain at the time of the Civil War. The final decision of the English government in recognizing the *belligerency* of the seceded States and in refusing to recognize their *independence,* shows how clearly the distinction was drawn between these two forms of recognition. The speeches of the Earl of Derby and the writings of Sir W. Vernon Harcourt expressed the highest juristic wisdom of the English people. Especially do we find in the "Letters of Historicus" written by the latter, such a clear and distinct statement of the principles of the law upon this subject as to leave no room for further discussion. In treating of the American problem Mr. Harcourt, in these letters, sums up a careful discussion of this question as follows; "When a sovereign state, from exhaus-

tion or otherwise, has virtually and substantially abandoned the struggle for supremacy, it has no right to complain if a foreign state treat the independence of its former subjects as *de facto* established; nor can it prolong its sovereignty by a mere paper assertion of right. When, on the other hand, if the contest is not absolutely or permanently decided, the recognition of the independence of the insurgents by a foreign power is a hostile act toward the sovereign state which the latter is entitled to resent as a breach of neutrality and friendship." (*Letters of Historicus,* p. 9.)

§ 5. The Recognition of Independence with Intervention

We may now turn to the other side of this question. We have already seen the conditions upon which the recognition of independence is justified by the strict rules of the law. We have seen that the insurgent community must have properly acquired a *de facto* sovereignty. We have also seen that the parent state must have properly lost its *de facto* sovereignty. If these conditions are fulfilled the recognition of independence is strictly legal, that is, justified by the rules of international law. But if these conditions are not fulfilled the recognition is strictly illegal, and hence must be justified, if at all, upon other grounds than those afforded by the law.

If international law has for its fundamental principle the sovereignty of nations—with the correlative duty of non-intervention—then any infringement upon that sovereignty is a violation of international law and an instance of intervention, and may be resented by the nation whose sovereign rights are thus invaded.

Intervention proper is not implied in mere advice, or mediation by request, or non-compulsory arbitration, or, in fact, in any other act when done with the voluntary consent of the state affected. But any form of compulsion, or dictation, or duress with the threatened use of force, or, indeed, any other act on the part of one state which is intended to deprive another of its sovereign rights, without its own consent, is properly intervention.

But not to lose sight of the specific question before us let us revert once more to the inconsistencies involved in the resolution submitted to Congress in 1896. We do this not to disparage the Committee on Foreign Relations, but to suggest the general misapprehension that may arise when the question of the recognition of independence is involved. The first inconsistency is implied in the first part of the said resolution, in the apparent supposition that the independence of Cuba could be legally recognized while the war was still going on—which, as we have seen, would, in fact, be an illegal act, and would justify resentment on the part of Spain. The second inconsistency is involved in the second part of the resolution, in that, while we were actually performing an illegal and hostile act, we were professing, at the same time, friendly relations with Spain in offering, without her request or consent, to bring to a close her war in Cuba. Hence, the two acts contemplated by this resolution involved a palpable interference with the legal sovereignty of Spain, and a clear case of intervention.

We are here brought into contact with a somewhat serious problem—a problem which must necessarily arise in case the recognition of independence is at-

tended by an act of intervention. If intervention is the infringement of national sovereignty, and, hence, a violation of the rules of law, the question becomes vital, whether there are, or are not, other grounds than those afforded by the law upon which such intervention may be morally justifiable. Does the law really contain all the principles which should control international relations? The law may, as a matter of reason, be founded upon justice; but justice may not, as a matter of fact, be entirely exhausted in the existing rules of law. Hence, the justification of an act of intervention may be a question not of law, but of ethics. It must be settled upon the moral grounds of reason and justice. But the moral justification to which one nation appeals may be entirely inconsistent with the *legal* justification to which another nation still adheres. One nation, for example, which adheres to the customary law, and which feels that its rights have been invaded, may appeal to war to vindicate its legal sovereignty; while the opposing nation, which appeals to reason may be obliged to accept war to vindicate its obligation to the higher law and its sense of justice.

As an historical illustration of how such a complex state of things may arise we may cite the intervention of France in behalf of the English colonies in America in 1778. When the colonies declared their independence in 1776, they acquired the status of an insurgent community in revolt against their legal sovereign. By forming a treaty of alliance with the colonies, France recognized them as an independent power; which act was, in law, an infringement upon the sovereign rights of Great Britain. Consequently, England to maintain her legal authority, and France to maintain

her adopted policy, both appealed to arms. To show that France expected war as the result of her interference, and at the same time to show that the chief purpose of her interference was to secure the independence of the colonies, we may quote the first two articles of her treaty of alliance with the United States (dated Feb. 6, 1778):

(Art. I.) "If war should break out between France and Great Britain. . . . His Majesty [Louis XVI] and the United States shall make it a common cause, and aid each other mutually with their good offices, their counsels and their forces."

(Art. II.) "The essential and direct end of the present defensive alliance is to maintain effectually the liberty, sovereignty and independence, absolute and unlimited, of the United States as well in matters of government as of commerce." (*Treaties and Conventions of the U. S.*, I, 480.)

A striking parallel may be drawn between the American situation in 1778 and the Cuban situation in 1898. In place of the English colonies in America, we have here the Spanish colonies in Cuba. In place of France we have here the United States as the intervening power. Instead of England we have here Spain as the aggrieved government attempting by war to maintain her legal sovereign rights. With these changes in name we have almost precisely the same international situation. We also find that, in both cases, the policy upon which the intervention was regarded as justifiable, was quite similar. In neither case did the intervening power seek to justify its course by an appeal to the law. Both France and the United States justified their acts upon rational and not upon legal grounds.

The real grounds for the intervention of the United States in the case of Cuba cannot, perhaps, be more clearly expressed than in the words of President McKinley. In his message to Congress (April 11, 1898) he said:

"The forcible intervention of the United States to stop the war (in Cuba), according to the large dictates of humanity, is justifiable upon rational grounds. The grounds for such intervention may be briefly summarized as follows:

"First. In the cause of humanity and to put an end to the barbarities, bloodshed, starvation and horrible miseries now existing there, and which the parties to the conflict are either entirely unwilling or unable to stop or mitigate.

"Second. We owe it to our own citizens in Cuba to afford them that protection and indemnity for life and property which no government there can or will afford. . . .

"Third. The right to intervene may be justified by the very serious injury to the commerce, trade and business of our people, and by the wanton destruction of property and devastation of the island.

"Fourth, and which is of the utmost importance. The present condition of affairs in Cuba is a constant menace to our peace, and entails upon this government an enormous expense. With such a conflict waged for years in an island so near us and with which our people have such trade and business relations; when the lives and liberty of our citizens are in constant danger and their property destroyed and themselves ruined,—all these, and others that I need not mention, with the resulting strained relations, are a constant menace to our peace, and compel us to keep

on a semiwar footing with a nation with which we are at peace." (Quoted in Moore's *Digest* of *Int. Law,* Vol. VI, 219, 220.)

In response to this message of the President, the Congress of the United States passed a joint resolution (April 20, 1898)—declaring "that the people of the island of Cuba are and of a right ought to be free and independent," demanding "that Spain at once relinquish her authority and government in the island of Cuba, and withdraw her land and naval forces from Cuba and Cuban waters," and authorizing the President of the United States "to call into the actual service of the United States the militia of the several states to such extent as may be necessary to carry these resolutions into effect." (*House Docs.,* 428, 55th Cong., 2d sess.)

These two illustrations—of France in the case of the American Revolution, and of the United States in the case of the Cuban revolt—show that the recognition of independence in favor of an insurgent community, when infringing upon the *de facto* sovereignty of a parent government, cannot be justified upon legal grounds, and must be justified upon grounds other than those afforded by the law, and also, if granted at all, must be done at the risk of war.

In summing up this general review of the international law relating to recognition, we are led to the following conclusions, in conformity to the policy of the United States:

(1) That the recognition of a new government is justifiable, provided that such a government is actually

established and exists *de facto* without the necessity of inquiring into questions of legitimacy.

(2) That the recognition of belligerency is justifiable in case of an insurgent community in revolt against a parent government, provided such a community has acquired a *de facto* political organization, and is engaged in actual warfare in the international sense, and the conflict is of such a nature as to affect the interests of the recognizing power.

(3) That the recognition of independence is justifiable in law, when the *de facto* sovereignty of the insurgent community has been actually acquired by the establishment of an effective political organization, and the *de facto* sovereignty of the parent government has actually been lost, which is evident from the cessation of hostilities.

(4) That the recognition of independence, granted by a foreign government to an insurgent community, by ignoring the existing *de facto* sovereignty of the parent state, is an act of intervention and strictly illegal, and is justifiable, if at all, upon grounds other than those afforded by the law, and must be enforced, if resented, by an appeal to arms.

CHAPTER IV

THE DIPLOMACY OF EUROPEAN POWERS IN THE FAR EAST: THE THREATENED PARTITION OF CHINA

That European diplomacy has not always been divested of selfish motives is evident from the efforts made by the Western Powers in threatening the dismemberment of the Chinese Empire. Since the partition of Poland there has perhaps never been a more systematic attempt to despoil the territory of a friendly nation in modern times than that which followed the close of the war between Japan and China in 1895. China had been for centuries occupying her own secluded home, trying as best she could to support her vast population, and giving little occasion for offense to her neighbors. She had, however, recently been drawn into a dispute with Japan regarding their respective rights of sovereignty over Korea, which was followed by an unfortunate war bringing her to the verge of exhaustion.

To understand how the governments of Europe came to be involved in the spoliation of this helpless country, it is necessary to go back to the Treaty of Shimonoseky, which closed the war between Japan and China (1894–95). In this treaty Japan hoped to reap the legitimate reward of her brilliant series of victories. She had swept the Chinese forces from Korea. Her navy had destroyed the Chinese fleet off

the Yalu river in the first decisive engagement between modern battle-ships. By a persistent campaign she had captured Port Arthur, the strongest fortress on the Chinese coast, which sheltered the harbor of Talienwan—an important port having the exceptional advantage of being ice-free during the whole year. On the southern coast of the Bay of Korea she had landed an army and by a combined land and naval attack had captured the strong fortress of Wei-hai-Wei. As her armies were concentrating in the direction of Peking, the Chinese imperial viceroy, Li Hung-Chang, was dispatched to Japan, and the Treaty of Shimonoseky was signed April 17, 1895.

The chief provisions of this treaty were as follows: (1) That Korea should be made independent under the tutelage of Japan; (2) that a part of the principality of Manchuria should be ceded to Japan—including the peninsula of Liao-tung, on which was situated the fortress of Port Arthur and the ice-free harbor of Talienwan; (3) that the island of Formosa should also be ceded to Japan; (4) that China should pay a war indemnity of 200,000,000 taels (a tael = $1.40). The execution of this treaty would have given to Japan an impregnable position on Chinese soil, and a powerful influence over the imperial court at Peking. It was at this time that Japan first learned that the adoption of an Occidental civilization had brought her within the toils and effective restraints of Occidental diplomacy. The rejuvenated child of the Pacific found her youthful ambition thwarted by the interests of states bordering upon the Atlantic.

§ 1. Interests of the European Powers in the Orient

It was Russia who first felt that her interests would be seriously threatened by the proposed encroachment of Japan upon Chinese territory. Russia had been for many years looking for an ice-free port, like that of Talienwan, which Japan was now ready to grasp after a few months of successful warfare. Hitherto frustrated on the Bosphorus in the attempt to reach Constantinople, she had been looking toward the East for a suitable outlet to the sea, and with every step into the Orient she had become more and more conscious of her increasing strength and of her increasing need. The ambitious Tsar had begun to hope for the ultimate union of Russia and Asia. The Russian general, Komaroff, is reported to have declared that "the East with all its countries, as China. Beloochistan and even India, are by the will of Providence destined for the Russian people."

That these words were not mere bombast is evident when one looks at the previous conquests by Russia in central Asia, and especially at the progress of the Trans-Siberian Railway, by which European Russia was to be linked to the Pacific. This gigantic pathway of commerce was destined to become the great artery of the Russian world. The only available terminus of this railway which had thus far been obtained was at Vladivostok. But this Pacific port was ice-bound during a portion of the year, and hence seemed an illogical and unscientific terminus of this greatest highway of the Orient. The port for which Russia craved was the harbor of Talienwan, sheltered as it was by the fortress of Port Arthur, and open

to the waters of the Pacific during every month of the year. Should she now lose this coverted port through her own inadvertence?

So fully alive was Russia to the situation that even before the close of the Japanese war, she had ventured to feel the pulse of Europe on the subject of intervention. In an article on the progress of the war, published in September, 1894, the Russian journal *Novesti,* which was supposed to represent the government, suggested that Russia, Great Britain and France should come to an understanding with a view to the partition of China, and urged that "such an undertaking would be comparable to the early occupation of America by the European powers, or the later division of Africa, and would render an inestimable service to civilization." This appeal of the Russian journal met with a varied response. France, having already begun the work of encroaching upon China by establishing a strong foothold upon her southern frontier at Tongking, had evidently no compunctions against engaging in any alliance that would advance her own interests. But England, who had years before rejected the proposal of Russia to divide the estate of one "sick man" in the Near East, declined to become a party in despoiling another sick man in the Far East.

Germany, however, who had not been included in the Russian plot of partition, evidently felt the slight, and did not hesitate to express it. In the very next month after the Russian journal had suggested the partition of China between Russia, England and France, the organ of Prince Bismarck revealed the position of Germany. This journal declared that the "German Empire must either be a world-empire or

a second-class power." But, it continued, "to assert itself as a world-empire, it must resolutely act upon this principle, that no further distribution of territory among European powers must be allowed without such compensation for Germany as shall maintain the existing balance of power."

Russia had felt for the pulse of Europe, and had found it. France and Germany could evidently be depended upon; and with these as her allies, England might be ignored. Accordingly, upon the combined remonstrance of Russia, France and Germany, the Treaty of Shimonoseky, which Japan had obtained from China, had to be revised. That part of the treaty which provided for the cession of Manchuria and the Liao-tung peninsula, with its invaluable possessions of the fortress of Port Arthur and the harbor of Talienwan, was stricken out; and Japan was obliged to be satisfied with her previous island possessions and an additional indemnity imposed on China of 30,000,000 taels.

This act of intervention on the part of the European powers was the beginning of the diplomatic conspiracy which threatened the dismemberment of the Chinese Empire. The relative position of the different interfering powers at this time in the Orient, it is not difficult to understand. Germany occupied no contiguous territory in the East, and with a few scattering islands in the Pacific, together with a vague and immature policy of colonial expansion, could not be regarded as a formidable competitor. France, by her possessions on the southern frontiers of China in Tongking, held an important base of operations from which she could make encroachments whenever a favorable opportunity was presented. Russia occupied

the most dangerous position with reference to China. Lying along the whole upper frontier of the Empire, she was persistently pressing toward the south, with hope of ultimately crowding her celestial neighbor off the earth.

England, it is true, already held on the southwest the large and important territories of India and Burma; but she was in no sense inclined to despoil China of her legal possessions. She held, however, by far the most advantageous position from a diplomatic point of view, and was the most influential suitor at the court of Peking. In her stronghold at Hongkong she was the only foreign power that now held an important point of vantage within the Empire. She was the first to appreciate the vast undeveloped resources of the Empire, and had already succeeded in opening a number of treaty-ports. She was the possessor of about eighty per-cent of the foreign trade of China. Her policy from the first had been based, not upon the possession of Chinese territory, but upon the opening of Chinese trade for the benefit of the world at large. Although the British policy of open trade had not been entirely successful in breaking down the Chinese prejudice against foreigners, and although the treaty stipulations had not always been kept with the most scrupulous faith by the Chinese, still England of all the foreign powers had retained the most influential position in determining the policy of the Empire. And this very fact was no doubt one of the causes of the calm indifference of Great Britain, which encouraged the adroit schemes of Russia and France in the early part of the diplomatic struggle.

§ 2. Early Attitude of Russia and France in China

To neutralize the influence of England at the Imperial court was the first important step to be taken by the Allied powers after the revision of the Treaty of Shimonoseky. The sweet and philanthropic benignity which was displayed by Russia at this time, and which on more than one occasion had deceived the world, was especially soothing to her stricken neighbor. That China should have looked upon Russia's act of intervention as an act of deliverance, is perhaps not to be wondered at, especially as she was assured by Russia that the proposed occupation of Port Arthur by Japan or by any foreign power would have endangered the independence and integrity of her Empire.

The friendship of Russia was still more acceptable when that Power offered to guarantee a loan for the benefit of China from French capitalists, for the lifting of her burdensome war-indemnity. This offer was gratefully accepted; the loan was floated in Paris, and the proceeds were handed over to China in the month of July, 1895. But that the Russian glove enclosed an iron hand China was made to feel, when she was prevented from borrowing money in the open market by the threat that in that case the Liao-tung peninsula, with the fortress of Port Arthur and the harbor of Talienwan, would be handed back to Japan. That Russia herself had no sinister designs upon the said territory appeared quite certain, when she offered no objections to the supplementary treaty of evacuation, which was signed by China and Japan in November, 1895, and which expressly provided that

the said peninsula should not be occupied by any of the allied powers, and also that the harbor of Talienwan should be made an open port.

While Russia in the North was thus busily engaged in pouring the oil of consolation into the wounds of her suffering neighbor, France in the South was quite as actively engaged in despoiling this suffering neighbor of some of her valuable frontiers. On the 20th of June, a little more than two months after the close of the Japanese war, the French minister at the court of Peking, with the connivance of his Russian colleague, obtained from China the cession of an important southern territory in the Mekong valley, which China had fifteen months before promised Great Britain in formal terms "never to alienate without the latter's consent." It is true that England afterward used this breach of faith as a means to obtain a new treaty, opening to her trade the West river, which flows from the southwest into the Pacific near the British station at Hong-kong. But this only proved a new spur to France, who influenced China to give orders for the construction of a railway along this same valley to connect with the French railway in Tongking—which concession was claimed as being necessary to neutralize the advantages given to British trade by the opening of the West river. By these concessions France laid the basis of a claim to a sphere of influence over the southern provinces of China.

§ 3. Commercial and Military Concessions to Russia

Of the three parties who had interfered with the execution of the Treaty of Shimonoseky, France thus

far seemed to be the most substantial beneficiary. But those who imagined that Russia had been quietly sleeping during the year after the war, were the misguided victims of their own innocence. With her usual diplomatic skill Russia was, as a matter of fact, gradually extending her influence over the Chinese government, obtaining practical control of the finances of the Empire, extorting industrial and commercial concessions for her own exclusive benefit, and establishing a sphere of influence over the northern provinces from which she could not easily be expelled. In July, 1896, China was induced to give her consent to the creation of a bank under Russian supervision by which to collect the public revenues and to transact the financial business of the Chinese government. At the same time Russia obtained the exclusive right to trade throughout the northern provinces.

But these concessions seemed trifling when compared with those that were later announced to the world in an issue of the *North China Daily News,* published in October, 1896. This purported to be the text of a "secret treaty" between Russia and China, which had been in existence for more than a year. Vague and irresponsible rumors of such a treaty had floated into England some months before, but that they contained any truth had been positively denied by high officials of the English government. When the facts were finally brought to light it appeared quite evident that it was not Russia that had been sleeping, but England.

To understand the extent to which Russia had succeeded in throwing her arms around her celestial neighbor, it is simply necessary to refer to some of the chief provisions of this "secret treaty." That the

text of the treaty as published was entirely authentic was not proved; but that it was substantially correct in its main features was fully confirmed by subsequent events. The treaty, in general, was a broad and magnificent scheme of Russian aggrandizement. Important industrial and commercial concessions, the military protection of Russian interests, and trade advantages over Great Britain were ingeniously wrought into its various sections.

In the first place, Russia was granted valuable railway concessions within the Empire. Branches of the Trans-Siberian Railway were to be extended into Manchuria in the direction of Port Arthur and the harbor of Talienwan, one branch from the Russian terminus at Vladivostok, and another from a point farther west connecting with the main trunk-line. In order that this grant might appear to be merely a temporary concession, the Chinese government was guaranteed the privilege of purchasing these roads after thirty-six years, or of taking full possession of them after eighty years. For the purpose of carrying into effect these projects, the Tsar was permitted to incorporate what was called the "Eastern Chinese Railway Company," the stockholders of which were to be exclusively Russian and Chinese subjects, to whom was also given the privilege of working the coal mines and of carrying on other industrial enterprises.

In the next place, Russia was promised an exclusive trading-port somewhere on the Chinese coast; and the harbor of Kiao-chau in the province of Shan-tung was provisionally leased to her for the term of fifteen years, on condition that she should not take immediate possession unless compelled by military necessity.

Furthermore, Russia obtained important military

concessions within the limits of the Empire. All railway property in which she was interested was to be guarded by Russian soldiers, or by police in the employ of the Chinese Railway Company. The Chinese army was to be reorganized under the direction of Russian officers. And Russia, on her part, was to give all necessary military and naval assistance for the protection of the fortresses of Port Arthur and Wei-hai-wei, which guarded the approaches to the Chinese capital at Peking.

§ 4. Russian Exploitation at the Expense of England

The remarkable ingenuity involved in these schemes for Russian aggrandizement is still further seen in certain provisions which were evidently intended to give Russian commerce a decided advantage over that of Great Britain. For example, goods carried on the Russian railways within the Chinese territory were to be entirely free from Chinese duties; and as these goods would be, in great part, the property of Russian merchants, it would relieve the commerce of Russia of those troublesome duties to which British commerce was constantly subject.

Still further, goods carried across the northern frontier, which were on the line of the Russian traffic, were to be subject to one-third less duty than that levied at the sea-port towns, which were in the line of the British traffic. This advantage that Russia obtained over England would, of course, be an advantage over all other foreign countries that traded with China through the treaty-ports which Great Britain had opened to the world.

The growing influence that Russia was gaining over the Imperial court at Peking, and the mode in which this influence was being shrewdly exercised to the detriment of British commerce are seen in still another particular. The principal trade of England with the interior provinces was carried on mainly by way of the great Yangtsze river, which empties into the Pacific near Shanghai, and upon which Great Britain had established a number of treaty-ports. And more recently to the south on the West river, which flows into the sea near Canton and Hongkong, she had thrown open a number of similar treaty-ports. Now every extension of the railway system from the north into these valleys would invade the sphere of British trade, and with the proposed discriminating duties already mentioned, would afford an additonal advantage to the commerce of Russia. The Chinese government was accordingly induced by Russia to issue an edict encouraging the construction of railways throughout the Empire, and to appoint a high official to take supervision of this work. A main trunk-line was projected through the center of China seven hundred miles long from Peking to Hankow, on the Yangtsze river; and another line was planned continuing the first from Hankow to Canton on the West river. This latter line was again to be connected with the French line, leading up the West river valley and branching off into Tongking, the territory of France, now the only active ally of Russia.

Although very little progress was made in the development of these railways during the subsequent year, the foreign trade of China gradually recovered from the effects of the Japanese war, and the anti-foreign sentiment seemed to be subsiding. The

amount of foreign trade at this time was estimated at 333,000,000 taels, of which Great Britain still claimed about seventy per cent. The fact that British trade did not seem to be suffering any serious injury is, perhaps, one reason why England was not fully alive to the real significance of the encroachments of her great rivals. Her policy remained practically unchanged—not to annex Chinese territory, nor to claim any exclusive privileges for herself, but to open, as far as possible, the vast and undeveloped resources of China to the free commerce of the world.

§ 5. Intrusion of Germany as a Competing Power

In the great project undertaken by Russia and France for the exploitation of the Chinese territory, Great Britain had thus far not only taken no active part, but had seemed almost oblivious of its real importance. It was only the spectacular intrusion of another foreign power that aroused her to a sense of her own insecurity. The sudden appearance of Germany upon the scene in December, 1897, startled the world, and gave a new and more decisive phase to the previous schemes of diplomatic extortion.

The necessity of colonial expansion presented no new idea to the German mind. Twenty-five years before Bismarck saw the importance of colonial markets as an outlet for German products, and claimed that "the future of the world belonged to the great states with great territorial and commercial interests." There was a strong party in the Reichstag devoted to the cause of colonial extension. The German press was already alive to the need of the situation and claimed

that Germany should receive her proper share in the coming distribution of the territory of "moribund nations." The mercantile classes also saw that the great increase of German industry, since the Franco-Prussian war, demanded a corresponding increase of German commerce. The *Altdeutsche Association* had recently addressed a memorandum to the Imperial Chancellor requesting him to take steps to obtain in Chinese waters either a harbor or a group of islands, and suggesting the Chusan islands, this course to be taken "without regard to the ill-will of any other Powers."

Germany was fully aroused by the recent encroachments of her professed allies, from which she was painfully aware that she herself had derived no substantial benefit. She was rightly convinced that to act at all, she must act at once. But where to strike was a question not easily answered. It was suggested that a fair compensation for the French and Russian seizures would be a slice of territory between the great rivers, the Hwang-ho and the Yangtsze-kiang. But this state of doubt and indecision was soon relieved by a startling event. Two German missionaries were just murdered in the province of Shan-tung, and this event was seized upon as a fitting pretext for the German invasion. The harbor of Kiao-chau was, therefore, occupied by a German squadron, and a force of marines landed upon Chinese soil. Although this port had been provisionally leased to Russia, Germany took immediate steps to effect a permanent occupation. Shortly, a lease of ninety-nine years was obtained from China, which also included valuable concessions in the province of Shan-tung. This bold, and as some regarded it, brilliant, stroke was followed up

by sending a naval expedition from Germany to the support of the squadron at Kiao-chau, accompanied by the bombastic benediction pronounced by the Kaiser upon Prince Henry, with the injunction to use his "mailed fist" against all intruders.

By the occupation of Kiao-chau and the establishment of a sphere of influence over the province of Shan-tung, Germany secured her desired place as a legitimate claimant for the spoils of China. But this appearance of a new and bold competitor in the field served only to quicken the action of Russia in carrying out her covert plan for the permanent occupation of the fortress of Port Arthur and the possession of the harbor of Talienwan. It has sometimes been said that the descent of Germany upon the coast of China was made with the connivance of Russia. The fact that Russia already held a sort of title to the port of Kiao-chau might lend color to this view, especially as the conciliation of Germany would give Russia a freer hand to deal with any opposition on the part of England.

However this may be, to all appearances Russia was evidently chagrined at the sudden intrusion of Germany, and seemed desirous of securing herself at Port Arthur against any possible designs of her original ally, who might in time assume the attitude of a rival.

§ 6. Russian Plot for the Possession of Port Arthur

The first move in the new diplomatic game, now to be played for the possession of Port Arthur, was the appearance of the Russian fleet in the neighboring harbor of Talienwan. Upon England's polite request for

an explanation of this suspicious move, the plausible answer was given that Russia was in need of a place for wintering her fleet, and as the Japanese ports were not convenient and as the harbor of Kiao-chau had already fallen into the hands of the Germans, the only alternative was to accept the kind invitation of China to winter the fleet near Port Arthur. The British minister at Peking was at the same time assured that this was only a "temporary measure."

It was difficult to question the sincerity of this reply. But there was evidently a desire on the part of England to put its security to the test. By a clause in the earlier Treaty of Tientsin (1858), British ships of war coming for no hostile purpose were given the liberty to visit any of the ports within the dominion of China. Acting upon the right conferred by this clause, the British admiral dispatched a couple of war-vessels to the vicinity of Port Arthur. This act was based upon a treaty-right, and seemed an excusable expedient to prevent any undue influence or illegal act on the part of Russia. But the keen sense of Russian honor was immediately touched by this step of the British admiral. Russia could see a reason for the presence of Russian ships, but no reason for the presence of British ships. A complaint was, therefore, made to England that the entrance of British war-ships into the peaceful waters of the port was regarded as so unfriendly as to have set afloat rumors of an impending war with Great Britain. Why the British ships soon left was not quite apparent, but they did leave; and the fact that they had left after the Russian remonstrance, could easily be interpreted on the supposition that they had left in consequence of the Russian remonstrance. This episode, unfortunate

for Great Britain but fortunate for Russia, seemed to establish by implication the Russian right to a dominant position at Port Arthur.

This first move on the part of Russia cleared the way for the second and more decisive move. It was not a mere dominant position that Russia desired. It was the permanent occupation of Port Arthur and the ice-free port of Talienwan. The successful progress of events emboldened Russia to assert a claim to a "sphere of influence" over the province of Manchuria including the peninsula of Liao-tung. The logical corollary of this claim was the right to use the fortress of Port Arthur as a necessary point of defense against any possible encroachment upon her newly acquired sphere of influence. The protests of England, whatever they were, were unavailing.

As the next and final move Russia demanded from the Chinese government a lease of Port Arthur and Talienwan on the same terms as those given to Germany for the occupation of Kiao-chau, together with the right to connect the Manchurian railway with stations within the Liao-tung peninsula. The granting of this lease in March, 1898, was, in fact, the culmination and logical sequence of the diplomatic intrigue which began with the intervention of the three allies at the close of the Japanese war in 1895. Great Britain was assured that these appropriations would not be used to annul any of her existing treaty-rights, but that "British trade would enjoy the use of any port open to Russia." But in spite of these assurances the diplomatic triumph of Russia was unquestioned. A sphere of influence was established over the frontier provinces of Manchuria, Mongolia and Eastern Turkestan. The province of Manchuria and the peninsula

of Liao-tung were practically annexed to the Russian Empire, and the Trans-Siberian railway had found its scientific terminus, an ice-free port on the Pacific.

To illustrate the devious diplomacy of Russia during this time, it is simply necessary to recount the different positions that she successively assumed—with the *ostensible* reasons that she presented at the time, and the *real* reasons that subsequently became apparent. (1) She remonstrated to China against the original occupation of Port Arthur by Japan, for the ostensible reason that the possession of that fortress by any foreign power would threaten the integrity of her Empire, when the real reason was evidently to secure that strategic position for herself. (2) She guaranteed the payment of the war-indemnity imposed on China, for the ostensible reason of relieving China from the humiliating effects of the Japanese war, when the real reason was to acquire such an influence over China as to extort from her valuable railway and industrial concessions for her own special benefit. (3) She collected her fleet in the waters of Port Arthur, for the ostensible reason of accepting the hospitality of China and affording a temporary mooring for her ships during the winter, when the real reason was to acquire a permanent naval station by which to protect her growing interests in the Chinese dominion. (4) She protested against the appearance of the British ships of war at Port Arthur, for the ostensible reason that such a proximity of war vessels would disturb the peaceful relations between the Powers, when the real reason was to afford a pretext for obtaining a lease of Port Arthur, and to secure herself against any adverse claim that might be made by another Power. (5) She had throughout given

the ostensible assurance to Great Britain that the treaty-rights of that Power would not be infringed upon, when she was really depriving England of those trade advantages that she herself was obtaining from the Chinese government.

§ 7. England's Share in the Diplomatic Quarrel

In the light of all that had taken place, it is difficult to say which was the more remarkable, the scheming adroitness and successful duplicity of Russia and the bold and decisive move made by Germany, or the calm indifference and what seemed to some the humiliating weakness of Great Britain. But thanks to the British sense of national honor, this state of passivity was not always to last. If the English nation was startled by the German occupation of Kiao-chau, it was astounded by the Russian occupation of Port Arthur. The British people, which had been lulled into quietude by the assurances given by Russia and apparently accepted by their own high officials, now became thoroughly aroused. Scarcely ever has the foreign policy of a nation been subjected to such scathing criticisms by its own people as those now directed against the British government. The press seethed with indignation. The *Fortnightly Review* accused the Prime Minister of "standing idly by while Russia and Germany were creating spheres of influence in Manchuria and Shan-tung." *Blackwood's Magazine* asserted that "since the loss of the American colonies, no such blow has been sustained by the British Empires as that which is symbolized by the Russian occupation of Port Arthur." The *National Review* claimed that "two

policies only were open to England, either to have made friends with Russia or to have fought her—and England did neither." The *Contemporary Review* declared that England stood in need of a "real leader," asserting that "her Majesty's ministers have been hoodwinked by Russian diplomatists, bamboozled by French statesmen, and non-plussed by the sudden collapse of China," and in despairing accents claimed that "the only salvation for England was in another Gordon, who could organize Chinese troops for the defense of Peking and the Empire."

Goaded by such exasperating criticism, the British Foreign Office felt called upon to enter upon some decisive course of action. But how to act and to preserve, at the same time, the traditional policy of England, was a difficult problem. In the month of March, 1898, the very month in which Russia had secured her hold upon Port Arthur, the House of Commons declared, by a unanimous vote, that "under any and all circumstances it was essential to the trade of England and her great interests in the Far East that the integrity of China should be preserved." But in spite of this resolution the painful fact stared Great Britain in the face that the integrity of China was already threatened. Should England then abandon her previous wise and unselfish policy, and join in the scramble for Chinese territory? Whether or not a new policy should be adopted, it seemed imperative that something must immediately be done to counteract the great influence that Russia had gained over the Chinese government. Accordingly, in April, 1898, England summoned her fleet, and took possession of the naval station at Wei-hai-wei—a strong position on the Bay of Korea, midway between that held by the

Russians at Port Arthur and that held by the Germans at Kiao-chau. The English fleet thus obtained an important point of influence which could be used to advantage in arousing the Chinese government to a sense of its obligation to protect the interests of Great Britain.

With the valuable concessions already secured by Russia, France and Germany, it now behooved England to understand her real status in the Yangtsze valley, which was, without doubt, the richest and most fertile part of the Chinese Empire. England was already in nominal possession of certain treaty-ports along the shores of this river; but the contracts upon which these rights were based were no more inviolable than other agreements which had been broken or disregarded. But however fragile these agreements might be, it was certain that the rights of Great Britain, as against other foreign powers, must depend upon the express will of the Chinese government. An important step was, therefore, made when an assurance was given to the British representative that the Yangtsze valley would not be alienated to any other foreign Power. This assurance, though couched in somewhat indefinite terms, gave to Great Britain a claim to what was called, for want of a better name, a "sphere of interest" in this valley. The valley itself was defined so as to include the territory of all the provinces bordering upon the Yangtsze river.

The nature of this unique right was not made entirely clear; but it was evidently intended to be distinguished from the right which other Powers had claimed under the euphemistic name of a "sphere of influence." The latter right is akin to a protectorate, and involves not only an exclusive claim to conces-

sions granted, but also a kind of supervision of the international status of the territory in question. England, while apparently abandoning her "anti-partition" policy, was not ready to abandon her "open-trade" policy. The privileges which she obtained were not intended for her own exclusive benefit, but for the benefit of the world at large. It seemed plausible, however, that the right which she claimed in the Yangtsze valley, while not of the nature of an exclusive concession, would yet preclude the granting of an exclusive right to any other foreign Power within the same territory. But in this special interpretation of her treaty-rights she evidently stood alone.

The definite distinction between the British "sphere of interests" in the Yangtsze valley, and the Russian "sphere of influence" in Manchuria was brought to light by an actual case of conflicting claims. When it was proposed to build a line of railway in Manchuria with British capital, the Russian government peremptorily forbade the contract, on the ground that such an act would be an infringement upon the rights which Russia claimed within her recognized "sphere of influence." But when it was announced that a contract backed by French and Russian capital had been made to construct the railway from Peking to Hankow—that is, into the heart of the Yangtsze valley—the protests of Great Britain were unavailing. The British "sphere of interest" thus seemed to be interpreted to mean that England had a right simply to trade in the valley; but that this right did not prevent the granting by China of special concessions in the same territory to other claimants. This was no doubt the interpretation that Russia and the other Powers desired. But the policy of Great Britain was becoming

more and more definitely formulated to the effect that British interests demanded the "delimitation" of this valley, and that any positive encroachment made upon the defined territory must be regarded as a *casus belli* —in other words, that the "sphere of interest" must be converted into a "sphere of influence," involving the same exclusive privileges, so far as concessions were concerned, that other Powers claimed under the latter convenient term.

That Great Britain became a real and active competitor in the diplomatic controversy was evident from several concessions which she soon obtained. For example, she acquired valuable mining privileges in the neighboring provinces of Shan-si and Hon-an. She also obtained such a revision of the navigation laws as practically to open all the rivers of China to British steamers, and to bring about the opening of several new ports to foreign trade. Moreover, she also acquired a lease of territory on the mainland opposite Hongkong, with the right of constructing a railway to Canton, and with a right to construct a railway from Burma across the Chinese frontier. Thus it appears that, although Great Britain was not one of that group of European allies who had originally intervened in the revision of the Treaty of Shimonoseky, she had yet been drawn, by the progress of events and contrary to her own traditional policy, into participation with Russia, France and Germany in the threatening dismemberment of China.

§ 8. Result of Four Years of Foreign Intervention

As the result of this period of foreign intervention, accompanied, as it was, by international rivalry and

intrigue, the relative positions of the separate Powers in China may be summed up approximately as follows:

(1) Russia had established a practical sphere of influence over the northern provinces of Manchuria, Mongolia and Eastern Turkestan, or about one-half of the whole of the Chinese empire, and had obtained such extensive concessions in Manchuria, including the peninsula of Liao-tung, as to make this territory, to all intents, a part of the Russian domain. She had also received important railway and mining privileges, and obtained the practical supervision of the military and financial systems of China. But, more than all, she had reached the chief goal of her ambition, a naval station at Port Arthur, and a scientific terminal for her Trans-Siberian railway, an ice-free port at the harbor of Talienwan.

(2) France had acquired a somewhat undefined sphere of influence over the southern provinces, with special concessions in the Mekong valley, and railway privileges from Canton along the valley of the West river.

(3) Germany had secured a new naval station at Kiao-chau, with a sphere of influence over the province of Shan-tung, with valuable industrial concessions in the same province.

(4) Japan had retained her title to the island of Formosa, and gained a general sphere of influence over the neighboring province of Fu-kien on the main land, and a practical control of Korea.

(5) England, in addition to her previous naval station at Hongkong, had acquired a new naval station at Wei-hai-wei. She had established a practical sphere of influence over the Yangtsze valley, includ-

ing the provinces on both sides of that river, and gained possession of a piece of territory on the Chinese coast opposite to Hongkong.

A later agreement made between England and Russia (April 28, 1899), although it did not affect the general situation just indicated, did, however, settle the dispute between these two Powers in regard to their respective claims in Manchuria and the Yangtsze valley, resulting in a compromise, whereby Great Britain agreed to forego the attempt to secure railway concessions in Manchuria, provided a similar policy was pursued by Russia in the Yangtsze valley. The effect of this agreement was evidently: (1) to make more definite the policy of delimiting the spheres of influence claimed by the separate Powers; and (2) to restrict the English policy of "open trade" to her own sphere of influence. While the territorial integrity of China was, in a certain sense, professedly maintained, it is quite apparent that every delimitation of a sphere of influence and every concession granted were really restrictions upon her legitimate sovereignty, which it seemed, at the time, would eventually result in the gradual absorption of the great part of Chinese territory by the European powers, or else in the practical establishment of a common protectorate over the whole Empire.

§ 9. Commercial Interests of the United States in the Orient

During this diplomatic struggle in which the chief powers of Europe were quarreling over the division of the estate of this decrepit "sick man" of the Far East, it may be interesting to inquire whether the

United States remained entirely a disinterested spectator. Let us bear in mind that the year in which this controversy reached its height (1898) was the year that closed the Spanish-American war, which left the United States in possession of the Philippine islands.

The treaty of peace that followed the Spanish-American war was negotiated at Paris, and was signed by the American commissioners on December 13, 1898. To be effective the Paris treaty required the ratification of the United States senate. Those persons who are inclined to look at political questions only from a high philanthropic point of view, and to think that the sole purpose of the retention of the Philippines was to rescue the benighted people of these islands from the "abyss of anarchy," and to extend to them the blessings of American civilization, might be somewhat surprised to peruse the discussions in the Senate, that led to the ratification of the treaty of Paris. They would see that not philanthropic motives only, but practical considerations as well, influenced the policy of the United States, and that these practical considerations were largely affected by the threatened partition of China.

The policy of the United States government, in this matter, was finally to be determined by the decision of the United States senate. The reasons that led to this decision may best be judged from the arguments put forward at the time by its most influential members. The argument of one of the most prominent members of that body—a member who was chairman of the Senate Committee on Foreign Relations, and also one of the Peace Commissioners at Paris, and whose words were said to have been most effective in

leading to the Senate's decision—is here cited to show the great influence that the existing situation in the Far East had in determining the policy of the United States with reference to the retention of the Philippine islands.

Among other things this Senator said that "for himself he was willing from the start to extend our borders so as to include these islands, because he believed their acquisition a most important stride in the advancement of the American nation, commercially and otherwise. He with others was looking forward to the prospective partition of the Chinese empire among the European nations, and he foresaw that if the United States did not secure a footing in the Orient such as they now have the opportunity to secure, they would be most effectually and forever shut out from this vast market. On this account there was every reason in the world why the treaty should be ratified; and he contended that few men who would study the world-wide questions presented, as the Commissioners had been compelled to study them, would doubt the expediency of the move. If we should fail to make good, we need expect no favors from Europe in regaining our foothold in Eastern markets."

From this reference to the motives leading to the ratification of the Treaty of Paris, it is evident that, on account of the threatened fate of China, the United States regarded themselves as a potential, if not an actual, factor in the Far Eastern problem. Whatever diverse opinions may have since arisen regarding the direct effect of the occupation upon the inhabitants of the islands themselves, or the retroactive effect of the occupation upon the colonial policy of the United States, one thing seems certain, that is, if the

United States desired most effectually to protect their own commercial interests in the East, and if they also wished to give a substantial or even a moral support to Great Britain in her struggle for "open trade," the maintenance of such a strong position as that afforded by the Philippines would be important, if not necessary.

But it is fortunate that we are now looking upon events that belong to the past. It is a source of congratulation that the holding of the Philippines, however much it may have been prompted by commercial motives, was evidently not only a wise policy, but a moral duty in sustaining part of the burden that rests upon all civilized people. It is also a cause of gratitude that, largely through the efforts of the United States, the threatened partition of China has been averted by the diplomatic skill of an eminent American statesman, who insisted upon the integrity of the Chinese Empire, and also by the work of the Washington Conference, whereby that ancient empire, it is hoped, has been secured from further aggressions.

CHAPTER V

THE DIPLOMATIC PROBLEM REGARDING THE SUEZ CANAL: ITS INTERNATIONAL STATUS

THERE may be a question in some minds as to how an international problem may be met which does not already come within the accepted rules of international law. One of the most interesting as well as instructive episodes in the history of European diplomacy was that connected with the opening of the Suez canal. Its special interest is due to the fact that this channel of the world's commerce presented a new problem for the solution of European statesmen and diplomatists.

It had already become a part of conventional international law that navigable rivers should be open to the commerce of all nations. The same rule had also become applied to natural straits connecting open seas. But the Suez canal was neither a navigable river nor a natural strait. It was an artificial channel, entirely within the territorial jurisdiction of a single sovereign, constructed and operated by a private incorporated company, with the simple consent of the local authority. But it soon appeared that other nations had a vital interest in this new pathway of commerce, which could not be ignored by the territorial sovereign. There was here presented a new question of international relationship, without an historical precedent or an accepted rule of law to guide the conduct of interested nations.

A review of the circumstances connected with the opening of this channel will show how an undertaking which began simply as a private enterprise under the auspices of an incorporated company, became recognized as a work of international utility and brought under the control of the great European powers. It will also, perhaps, show that a water thoroughfare of the world's commerce cannot be regarded as the absolute property of any state, but that its proprietary character is limited and conditioned by the wider interests of the world community.

§ 1. The Suez Canal as a Financial Enterprise

The story of the Egyptian canal does not, of course, begin with Ferdinand de Lesseps. It reaches back almost to the dawn of history. It is asserted, on the authority of Strabo, that fourteen centuries before the Christian Era a channel was cut from the Nile to the head-waters of the Red Sea, only to be swallowed up by the sands of the desert. Since that time the project of piercing the isthmus has been cherished not only by the Pharaohs, but by the Persians, the Ptolemies, the Romans, and the Saracens. During the French occupation of Egypt in 1798, Napoleon caused a route to be surveyed between the Mediterranean and the Red Sea; but his engineers emphasized the difficulty of the undertaking on account of the fact that the level of the Red Sea was calculated to be thirty feet above that of the Mediterranean. This error was afterward corrected both by French and English engineers, who announced that the two seas were upon the same level.

Although the need of a more direct route between

Europe and the East became clearly apparent during the early part of the nineteenth century, nothing was accomplished on account of the disturbed condition of Egypt growing out of the wars of Mehemet Ali. But in 1840 Mehemet was obliged by the Great Powers to give up his hope of independence and to remain in his previous position as Viceroy of Egypt and vassal of the Sultan of Turkey.

After this pacification of Egypt, there were soon presented to the attention of the Viceroy two rival schemes for piercing the isthmus—the one which had been brooding in the mind of the Frenchman De Lesseps, and which involved the construction of a ship-canal, the other advocated by the renowned Englishman, Robert Stevenson, which involved the construction of a railroad from Cairo to Suez. This latter scheme met with the approval of the now peaceful viceroy, Mehemet Ali, who was a hard-headed statesman and no dreamer of dreams. The railroad was consequently built; it brought great profit and involved no complications with foreign powers. The succeeding viceroy, Abbas Pasha, adopted the policy of his predecessor, and was contented with the benefits afforded by the trans-isthmian railway.

In 1854 the vice-royalty passed into the hands of Said Pasha, who became fascinated with the earlier scheme of De Lesseps. He had received his education in Paris, where he had developed a sympathy with Frenchmen and with French ideas.

In reviewing the early history of the Suez canal it will be impossible not to make some reference to the financial side of the project under Said Pasha. In spite of the fact that the canal itself has been one of the greatest commercial gifts to the modern

world, its construction involved one of the most gigantic swindles on record, and brought Egypt within the toils of European stock-jobbers.

The proposition which De Lesseps presented to the vivid imagination of the innocent Egyptian Pasha was alluring in the extreme. The Pasha was not to invest a single *sou* in the construction of the canal; he was to receive fifteen per cent of all the profits derived from its operation; and at the end of ninety-nine years everything was to revert to the Egyptian government. All that was desired of him was to grant to De Lesseps the exclusive power to form a company for the purpose of constructing and operating the canal between the two seas, and, also the right to build at the cost of the Company a smaller parallel canal connecting with the Nile to supply the workmen with fresh water.

The prospect of adding so much to the material prosperity of Egypt with no financial burdens resting upon the government was too dazzling to be rejected; and the first concession, involving a ninety-nine years' lease, was granted by Said Pasha to De Lesseps, November 30, 1854. A second concession given January 5, 1856, detailed further specifications regarding the construction and operation of the canal. To prevent the importation of a large body of foreign laborers into his country, the Viceroy stipulated that the work should be done by the forced labor of the fellaheen, the Egyptian peasantry, who should be furnished by himself and be fed by the Company. The only provision which seemed to concern the interests of foreign Powers was contained in the fourteenth article of the Concession of 1856, which promised that the canal and its ports should be "open forever as

a neutral passage to all ships of commerce passing from one sea to the other," on payment of the dues established by the Company.

One of the important items in this concession was to the effect that the work should not be commenced until the approval of the Sultan of Turkey had been obtained. But after some delay the Viceroy was persuaded by De Lesseps that this approval was a mere formality, and that it would be proper to make preliminary surveys, and to begin the work without the formal approval of his nominal suzerain, the Sultan of Turkey. The Company was accordingly formed under the direction of De Lesseps, and the first stone of the canal was laid at Port Said, April 25, 1859.

These initial steps were accomplished by the first successful attempt to draw the confiding Viceroy into the financial meshes of the Company. The estimated cost of the whole undertaking was 200,000,000 francs. The efforts of De Lesseps and his associates to raise the money in Europe had thus far been fruitless. France and England had not fully recovered from the financial strain of the Crimean war; and German bankers were not captivated by the new scheme. De Lesseps accordingly appealed to the sympathies of the Egyptian viceroy, who kindly consented to loan the company various sums amounting to 2,395,000 francs; so that the construction of the canal was fairly begun with the money of the Viceroy,—who was not expected to contribute a *sou*.

The pliable temper of the Viceroy induced the Company now to seek for a new concession. This was the right to build a second fresh water canal along the banks of the main canal, whereby fresh water could be distributed along its entire course. This right

was granted to the Company, together with the privilege of selling the water for purposes of irrigation and also of appropriating the products of the fertilized district.

The Company thus found in Said Pasha a generous friend, while their subscription books remained open in Paris without subscribers. Should this magnificent project so successfully begun with the funds of the Viceroy now fail for want of financial support? was the query put by De Lesseps to the grantor of the concession. Said Pasha could not endure the thought of such a possibility, and he was induced to subscribe for 177,662 shares out of 400,000, the total amount of the Company's stock. This subscription, which represented a nominal value of over 17,000,000 francs, was the beginning of the Company's prosperity, as investors from that time were not wanting. As Said Pasha was himself now a pauper, and as Egypt had been thoroughly squeezed by his predecessor, he soon found it difficult to meet his obligations to the Company; but the ingenious De Lesseps suggested to him that his obligations to the Company could be easily met by his signing treasury-warrants, bearing ten per cent interest and payable in four annual installments, and this paper would be readily cashed by European bankers. This suggestion was accepted; but by calculating the interest on these warrants Said Pasha soon discovered that instead of owing the Suez Company over 17,000,000 francs, he was a prospective debtor to Europe for more than 24,000,000 francs—and he recollected that the Suez canal was not to cost him a *sou*.

The studies in French financeering, thus inauspiciously begun by Said Pasha, were cut short by his

death in 1863, when he was succeeded by his nephew, Ismail Pasha, the grandson of the great Mehemet Ali. Ismail was a prince of immense fortune, and he used a part of his wealth in purchasing from the Sultan in 1866 the title of Khedive in place of the previous title of Viceroy. Whether the new Egyptian ruler would be as pliable to the machinations of the European promoters as was his predecessor, was for a time a matter of speculation. This could be determined only by a trial. The canal managers assured Ismail that the concessions already granted to the Company were altogether too generous—that the second fresh water canal was in fact not needed and that the Company would be willing to retrocede to him all rights therein, provided he would complete the first fresh water canal at his own cost, the right to its use still remaining with the Company. The generosity which seemed to inspire this proposal evidently presented to the mind of Ismail a reason for its acceptance. In this way, the new Egyptian ruler in addition to assuming the obligations of the treasury-warrants issued by his predecessor, amounting to some 24,000,000 francs, assumed the new obligation of constructing a part of the Company's work, which proved to be equivalent to putting 50,000,000 francs more into the Company's treasury.

This rehearsal of the financial methods adopted by the Suez canal company suggests but a small part of the troubles into which Egypt was plunged by the construction of the great canal.

§ 2. England's Early Opposition to the Project

The financial troubles now became mixed up with diplomatic complications. England had not up to this

time looked with any favor upon a shorter water-route to India, which would really place her at a disadvantage with other European powers, especially if this route should be under the control of French influence. Lord Palmerston was entirely opposed to the construction of the new channel. The position of England was clearly expressed by an English writer, Nassau Senior, as early as 1856 in these words: "For commercial and military purposes we are now nearer to India than any other European nation except Spain and Portugal, which are nothing. When the canal is open, all the coasts of the Mediterranean and Black Seas will be nearer to India than we are. The first proposer of the canal was Bonaparte for the purpose of injuring England. At present India is unattackable. It will no longer be so when Bombay is only 4600 miles from Marseilles; and although we shall also be able to send troops through the canal, our present position of perfect safety is far better than that of the amplest defence." (Quoted in Cameron's *Egypt in the 19th Century*, p. 231.)

Until the accession of Ismail, England had withheld her capital from the enterprise, and was now watching with anxiety the progress of the short cut to India. The interests of England seemed opposed to the prosecution of this work. It remained to be seen whether the resources of English diplomacy would be equal to the demands of the English policy. England could urge in support of her claims two points—a point of law and a point of humanity. In the first place, the work on the canal had thus far been prosecuted without the necessary and stipulated approval of the Sultan. It was hence entirely unauthorized; and its cessation could properly be ordered by His

Highness. Again, the work had thus far been carried on under a horrible system of forced labor, which shocked the sensibilities of Europe. The fellaheen had been wretchedly treated; they were fed upon the worst of food, and compelled to work with the worst of tools, and they had perished like flies under the burning sun. Great Britain appealed to the Sultan to put an end to these barbarities by putting an end to this work. The appeals of England were met by the claim on the part of the canal Company, that the great investment of French capital required the continuance of the enterprise. The Sultan, placed between two fires, compromised by making valid the concession, but prohibiting henceforth the employment of forced labor.

By the abolition of the forced labor, upon which the success of the canal seemed to depend, England had reason to believe that she had succeeded in putting a stop to the whole enterprise. The Company, however, instead of abandoning the work, now adopted new mechanical appliances and more modern engineering methods. To compensate them for this additional expense, a new line of extortion was suggested to the canal managers. By the prohibition of the forced labor it was claimed that the Company would suffer immense losses and would perhaps be compelled to give up the whole undertaking. A heavy bill for indemnity was accordingly presented to the Khedive as a consequence of his breach of contract. He may perhaps have been enough of a lawyer to wonder how he could be held liable for a breach of contract when no legal contract had existed. At any rate, he persisted in protesting against the unjust and inordinate bill for damages. At the urgent solicita-

tion of De Lesseps he consented, however, to arbitrate the question, and yielded to the proposal that the issues between himself and his French antagonists be left to the impartial decision of that unique impersonation of international honor, the French Emperor Napoleon III.

The questions left to the Emperor, were: first, the question of direct damages resulting from the prohibtion of the forced labor, that is, for the breach of a contract which never existed; and second, the question of indirect damages resulting from the retrocession of the second fresh water canal, for which Ismail had already paid the Company what was equivalent to 50,000,000 francs. After conning these legal questions the Emperor decided: *first,* that the Khedive, by the failure of the Sultan's approval, had broken his contract, and hence should be assessed to the amount of 30,000,000 francs; and, *second,* that the Company would no doubt have derived large benefits from the second fresh water canal had it not been retroceded to Ismail—namely, from the sale and lease of irrigated lands, from water tolls and from other valuable interests which would have accrued if the canal had been completed; and that hence, figuring up these various items, the Company was entitled to damages to the amount of 54,000,000 francs—the two assessments amounting to 84,000,000 francs.

The ease with which this award was obtained suggested to the Company the propriety of formulating a new bill of damages containing items which had been overlooked in the first bill, including among other fancied injuries, the loss of the value of the fish which might have been taken in the canal had it remained with the Company, and been completed. This new

bill was solemnly presented to the Khedive; and on his bitter protest, it was suggested to him that this matter also had perhaps better be arbitrated: Ismail collapsed. In his despair he agreed to pay the Company an additional 30,000,000 francs, with the understanding that nothing more be said.

But the Company, even after this, succeeded in tricking their victim out of 10,000,000 francs in a certain real estate deal in connection with the Land of Goshen. The story is told that a certain European financier was having an audience with the Khedive in his palace, when Ismail was observed to rise and close a window behind the caller. Being asked by a friend why he did this, the Khedive replied, "If that sharper could allege that he has sat in a draft and caught cold in my palace, it would take at least a quarter of a million francs to meet the demand he would make for satisfaction. I am beginning to understand these European business gentlemen."

It is stated on good authority that the Suez canal, which according to the original representations of De Lesseps was not to cost Egypt a *sou,* actually cost that country 400,000,000 francs before the Canal was opened in 1869.

§ 3. Its International Significance and British Interests

It will be seen that the enormous debt thrown upon Egypt by this scheme of commercial rapacity and injustice was an element in finally determining the international position not only of the Canal but of Egypt. After the channel was cut and had become

a general thoroughfare for the ships of all nations, and especially after its continued use had established what might be regarded as vested commercial rights, it could hardly be expected that it would long remain under the exclusive and perhaps arbitrary control of a French financial company, or under the sole protection of a weak and irresponsible power like Egypt.

The interests of all nations were concerned in the freedom, the protection and equitable management of this new pathway of commerce. The Sultan himself, although the waterway was entirely within his own sovereign domain, had early recognized the fact that it possessed an international character, and that its protection should be guaranteed by some adequate force, like that which might be furnished by the united action of France and England. That other powers might be convinced that their commercial interests would be respected, the Sultan invited to Constantinople in 1873 an International Commission, which declared "that the navigation of the canal should at all times be equally enjoyed by the vessels of all nations," and this declaration was accepted by the Porte, by the Powers and by the President of the Company.

This policy seemed on the surface adequate for all times of peace. Its defect was not apparent until 1875, when for certain reasons, not very clear, the Company saw fit to issue a threat to close the canal temporarily to *all* vessels without distinction. It was at this time that England, who owned a large part of the canal traffic, perceived the danger of permitting her commerce to be subject to the whims of the present canal managers; and Disraeli gained for Great Britain a predominating voice in the Company by purchasing for 4,000,000 pounds sterling all the shares

held by the Khedive. As the policy of England was in favor of free and equal commerce, the international status of the canal, so far as it related to times of peace, seemed fairly well settled, although it was secured by no treaty stipulations.

The great question, however, and that which was most difficult of solution, related to the position which the canal should hold in time of war. The International Commission at Constantinople in 1873 had made no provision for this. It had not prohibited belligerent acts within the limits of the canal; it had neither authorized nor proscribed the building of fortifications upon its banks; neither had it secured the entrances of the canal against a blockade in case Egypt should become a belligerent Power. Hitherto, the condition of Europe had, it is true, presented no serious occasion for settling these questions. During the Franco-Prussian War of 1870–71 the canal had been threatened by no belligerent acts.

But at the outbreak of the war between Russia and Turkey in 1877, a new condition was presented. Egypt was properly a part of the Ottoman Empire. It was one of the possibilities of the war that the Mediterranean entrance to the canal might be blockaded by a Russian fleet. In view of the danger which thus threatened the commerce of England and of Europe, Lord Derby, in 1877, addressed to the Russian Ambassador a note containing these words: "An attempt to blockade or otherwise to interfere with the canal or its approach would be regarded as a menace to India, and a grave injury to the commerce of the world. . . . The mercantile and financial interests of European nations are so largely involved in Egypt that an attack on that country, or its occupation even

temporarily for purposes of war, could scarcely be regarded with unconcern by the neutral Powers, certainly not by England." To this unambiguous note the Russian government made the following discreet reply: "The Imperial Cabinet of Russia will neither blockade nor interrupt nor in any way menace the navigation of the Suez canal. They consider the canal as an international work, in which the commerce of the world is interested, and which should be kept free from any attack." (Quoted, *Quar. Rev.* Vol. 165, p. 447.)

On account of the bold stand thus taken by England it became evident that Egypt was to be treated as a quasi-neutral territory, at least during the period of the Turco-Russian war. Both England and Russia had recognized the fact that this channel of the world's commerce could not be treated as a mere piece of corporate property, subject to the jurisdiction of any territorial power. It certainly possessed an international significance, and in it all nations possessed an equitable interest. But there were no existing rules of international law which applied to it. Its position was unique. Nothing like it had been known since the modern law of nations had come into being. It could not be treated like the open sea, because it was not a *res communis*. It could not be regarded as a natural strait, because it had been artifically constructed by the investment of private capital. It could not be considered as a navigable river, because it was worked for profit under concessions from a territorial power. The progress of international law had evidently not kept pace with the growth of international relations and interests.

§ 4. Academic Discussions as to Its International Status

In view of the peculiar and problematic features which the canal presented, the question as to its proper legal position became for a few years the subject of an interesting academic discussion on the part of eminent European publicists. The question came before the *Institut de Droit International,* which included in its membership such distinguished jurists as Sir Travers Twiss of England, Professor Bluntschli of Germany, Professor Martens of St. Petersburg and Professor Neumann of Vienna. The *Institut* was unanimous in the belief that the interests involved in the canal made it the proper subject of international control; that it should be open at all times to the merchant ships of all nations; and that it should be exempt from any hostile attack in time of war.

But upon other questions, relating to the extent to which the principle of "neutrality" should be applied to the territory, there was great difference of opinion. Professor Martens claimed that the canal should be neutralized in the sense that it should be "inaccessible to the war ships of belligerents." Professor Bluntschli wished the passage free to all private vessels, even those belonging to a nation at war with the Porte. The most complete form of neutralization was advocated by Professor Neumann, who desired the creation of what he called a "marine Belgium," in other words, the erection of territorial limits, which would be immune from hostile attacks, exempt from the presence or passage of belligerent forces, deprived of fortifications, and protected under the guarantee of

the great Powers. But all these proposals to "neutralize" the canal in any strict sense of that word were met by Sir Travers Twiss, who showed that England could never become a party to any agreement that would cut off or restrict her marine communication with India in time of war.

After four years of discussion extending from 1877 to 1880, during which time it was admitted that the international status of the canal could not be determined by any existing law, but must be settled by treaty-stipulations, the *Institut* recorded its conclusions in the following brief and general statements:

(1) It is to the general interest of all nations that the maintenance of the canal and its use for communications of every kind shall be as far as possible protected by treaty.

(2) With this object in view it is desirable that states should come to an arrangement with a view to avoid, as far as possible, every act by which the canal and its dependencies might be damaged or endangered even in time of war.

(3) If any Power should damage the works of the canal, it shall be bound to repair as speedily as possible the mischief done, and to reëstablish the liberty of the navigation of the canal. (Quoted, *Fortnightly Rev.,* Vol. 40, p. 47.)

The chief result of this long academic discussion and this summary of the views of international lawyers, was to emphasize the inadequacy of the existing law. The present problem showed very clearly that existing international law does not necessarily furnish the ultimate basis for the settlement of all international questions that may arise; but that it must be continually supplemented by new expressions of inter-

national authority obtained through diplomacy and treaty-stipulations. To use the words afterward employed by Professor Lawrence: "Here was an instance of the breakdown of a legal system for want of rules applicable to a new set of circumstances." (Lawrence, *Disputed Questions,* p. 57.)

§ 5. Diplomatic Efforts toward a World Policy

Events soon occurred which caused this whole question to be transferred from the level of academic discussion to the higher plane of international diplomacy. How closely these events were related to the financial troubles of Egypt to which we have already referred, it would not be difficult to trace. But it must not be supposed that the financial distress of Egypt was due solely to the fact that its rulers had been victimized by the managers of the Suez Company. It was due quite as much to the excessive extravagance of the rulers themselves, especially to that of Ismail Pasha, who was by way of distinction a prince of prodigality. All the wealth that he himself possessed and all that he could obtain by the issue of bonds to European bankers, he lavished upon Egypt, hoping to make that country a rival of the second French Empire. By his passion for display he impoverished his people and made his country a bankrupt. It is said that during his rule from 1863 to 1879 he succeeded in increasing the Egyptian debt to 80,000,000 pounds sterling, or about 2,000,000,000 francs, one-fifth of which was incurred in connection with the construction of the Suez canal. This debt was held mostly by European investors.

The time came when Egypt was no longer able to

pay the interest due to foreign bond-holders, and the finances of the Egyptian government were placed under the "dual control" of France and England. Although Ismail surrendered all his private estates valued at 100,000,000 francs, he was still unable to satisfy the demands of his creditors; and the Sultan was induced by foreign influence to depose him from his position and to put in his place his eldest son, Tufik Pasha. This occurred in 1879.

The new Khedive ruled only in name, the real administration being in the hands of the two foreign governments, France and England. The severe methods now adopted to restore the financial credit of Egypt, accompanied as they were by extensive retrenchments and burdensome taxes, were followed by a general uprising on the part of the army and the people, in an attempt to overthrow the existing régime. This revolt of 1881 was led by Arabi Pasha, the Egyptian minister of war and leader of the so-called "national party." The movement was primarily a military movement, and was an effort to put an end to the foreign influence in Egypt. France at this time saw fit to withdraw from the "dual control," and upon England alone was thrown the responsibility of suppressing the rebellion. The reduction of Alexandria by the fleet of Admiral Seymour and the defeat of Arabi's army by General Wolseley left England in 1882 the sole protector of European interests in Egypt. For the maintenance of public order and pending the settlement of the Egyptian question, the country was occupied by British forces and placed under the energetic supervision of Lord Cromer.

The question as to the justice or injustice of the British occupation is not relevant to our present dis-

cussion. The fact exists that, by a sequence of events which seemed almost inevitable, the European interests in Egypt had been brought under the exclusive guardianship of Great Britain. And it is a question whether there was any other Power better fitted for the execution of this trust. England was as little responsible as any other country for the deplorable condition into which Egypt had been thrown. She was as interested as any other in restoring the financial credit of Egypt; and she was more concerned than any other country in maintaining public order and in protecting the water-route to the East. Although originally opposed to the construction of the Suez canal, it had become one of the conditions of her prosperity, and she had become one of the strongest advocates of its security and freedom. Her own interests in Egypt thus seemed in harmony with the commercial interests of the world. Gladstone said at this time (1882) "that Egypt having become the great gate between the East and the West it is essential for the industry and enterprise of mankind that the gate should be kept open." This opinion of Gladstone was the opinion of England, and indicates the purpose toward which English diplomacy was for six years directed.

That the British occupation of Egypt was intended originally to be merely temporary seems to be quite clear, from the immediate efforts of the British ministry to secure some efficient guarantee for the freedom of the canal after the occupation should cease. The first general diplomatic note on the subject after the suppression of Arabi's revolt in September, 1882, was written by Lord Granville in January, 1883. This note was addressed to the courts of France, Germany,

Austro-Hungary, Italy and Russia. It presented the English view of the situation, and brought the whole subject for the first time fairly within the field of diplomatic discussion.

It will, of course, be impossible for us to follow the special negotiations regarding this matter which, with many interruptions, extended from 1883 to 1888. But in looking at these discussions one cannot help being impressed with the difference in the method pursued by the diplomatists from that previously employed by the academicians. The members of the *Institut* having no power to create law, had sought to bring the facts of the case into harmony with the existing law. To them the only feasible method to protect the canal from hostile attack was to bring the territory under the existing law of "neutralization,"—which would mean that the canal should not be used in time of war for the passage of belligerent vessels. But this was precisely the position with which Great Britain could not agree; in other words, the conservation of her own interests would not justify England in permitting the facts to be brought under the existing rules of law. The rules regarding neutralization which had previously been established for Belgium and Luxembourg could not be accepted as applying to the condition of things now existing in Egypt. Hence the present case was not one which could be settled by the simple method of juristic interpretation employed by the publicists.

The method of the diplomatists, on the other hand, was more akin to that of legislation—to establish a new rule of law to apply to the new condition of things, to modify the existing law of neutralization, so as not to infringe upon the interests and equitable

rights of Great Britain, in other words, to bring the law into harmony with existing facts. Considerations of this kind led Lord Granville to avoid the use of the word "neutralization" in his dispatch of January, 1883, and to suggest rules to fit the case in hand, whether already existing or not.

The rules suggested by Lord Granville involved: (1) the freedom of passage of all vessels under any circumstances; (2) the limitation of the time for which belligerent vessels might remain in the canal; (3) the prohibition of hostilities in the canal or its approaches; (4) the repairing of damages done by the vessels of war of any Power; (5) the forbidding of fortification on the canal, or in its vicinity; (6) the maintenance of the territorial rights of Egypt, as far as consistent with the above conditions; and (7) the authorization of Egypt to enforce the conditions imposed upon the transit of belligerent vessels.

It will be seen from this summary that the rules suggested by Lord Granville departed from the ordinary rules of neutralization (1) in permitting the transit of belligerent vessels in time of war and (2) in placing the guarantee of protection in the hands of the territorial power.

After these rules had been submitted to the Powers in 1883, the next important diplomatic step was the reference of the rules to an International Commission which convened at Paris in March, 1885. The States which were represented at this conference were Great Britain, France, Germany, Austro-Hungary, Russia and Italy, that is, the six great Powers—together with Holland, Turkey and Egypt. It is worthy of note that there was at this conference no difference of opinion as to the justice of the claim insisted upon by

Great Britain, namely the freedom of passage for all vessels in time of peace or war, whether neutral or belligerent. The chief point of divergence related to the mode in which this new form of so-called "neutralization" should be guaranteed—England insisting upon the territorial, and France upon an international guarantee. Neither of these methods, however, recognized the sovereignty of the Sultan, and hence exposed the treaty to the opposition of the Porte.

Another convention was accordingly signed in May, 1887, which provided that the canal should be watched over by the foreign diplomatic agents in Egypt, who in case of a threatened danger should report to the Khedive; that the Khedive should to the extent of his power enforce the canal regulations; and, that in case of his inability, he should appeal to the Sultan, who in turn should advise the Six Great European Powers. This complicated method might be regarded as primarily a territorial, but ultimately an international guarantee. After these negotiations the final convention, embodying the general principles just described, was ratified at Constantinople in October, 1888, by the Great Powers and by Turkey, Spain, and the Netherlands.

Such were some of the most important steps by which the Suez canal was brought within the field of European diplomacy, and apparently brought under a new international law relating to an artificial and navigable channel between two seas.

§ 6. British "Reservations" during the English Occupation

From the facts which have just been narrated the conclusion would naturally be drawn that the Suez

canal was finally brought under the ultimate guarantee of the Great Powers. But such did not seem to be the case. Before signing the convention adopted by the Paris Commission of 1885, which formed the basis of the Convention of Constantinople of 1888, the British delegates made a general reservation to the effect that the treaty should be held to bind Great Britain "only when the settlement of the affairs in Egypt permitted her to withdraw her troops from that country." This reservation was again communicated to the Powers by Lord Salisbury in 1887, reminding them that this was the condition upon which England had signed the treaty.

This fact was not brought to general notice until the Spanish-American war, when in 1898 the Spanish warships remained at Port Said for more than twenty-four hours, the limit set by the treaty signed at Paris in 1885, and ratified at Constantinople in 1888. In answer to an inquiry put to the British government as to whether the delay of the Spanish vessels was not in violation of the Suez canal convention, Mr. Curzon, then Under Secretary of Foreign Affairs, replied: "The provisions of the Suez Canal Convention to which the honorable gentleman refers have never been brought into operation." Some days later in answer to an inquiry whether the Convention of 1885 was still in existence and in operation, the same official said; "the Convention in question is certainly in existence, but as I informed the honorable member in answer to a question some days ago, has not been brought into practical operation. This is owing to the reserve made in behalf of Her Majesty's Government by the British delegates at the Suez Canal Commission in 1885, which were renewed by Lord Salis-

bury and communicated to the powers in 1887." (Quoted, *Annual Report Amer. Hist. Assoc.*, 1902, Vol. 1, p. 298.)

If the great Powers were to accept the force of this reservation in the way in which Great Britain evidently desires it to be interpreted, we must then conclude that the Suez canal was not "neutralized," either in the sense in which that word was interpreted by the members of the Institute of International Law, or in the modified sense adopted by the delegates to the Paris commission of 1885. It must be regarded, at least during the British occupation, as a highway of general commerce to which the right of transit was given to all nations, this right being secured under the protectorate of Great Britain. If this occupation should terminate, the provisions of the Paris convention of 1885 as ratified by the Convention of Constantinople of 1888 would no doubt come into operation. But if this occupation should be permanent, it seemed to be a question whether or not the great Powers would regard the international status of the Canal sufficiently guaranteed simply by British control.

This doubt was not set at rest by the Anglo-French agreement of April, 1904, when Great Britain declared "her adherence to the stipulations of the Convention, and agreed to their being put in force, except as regards a provision by which the agents in Egypt of the signatory Powers of the Convention were to meet once a year to take note of the due execution of the treaty." It has been said that "it was by virtue of this new agreement that the Russian war-ships proceeding to the East in 1904–1905 were enabled to use the canal, although passage was prohibited to Spanish war-ships in 1898 during the war between

Spain and the United States." (Enc. Brit., 11th Ed., Vol. 26, p. 25.)

From these statements it would seem that during the period of occupation, the control of the canal was, by virtue of the British reservation, to be practically in the hands of Great Britain, without the interference of the agents of the other signatory Powers, and the question as to what foreign belligerent vessels should or should not have access to the canal was a matter wholly within British discretion. Such an interpretation, based upon Great Britain's reservation, would, of course, suspend the provisions of the treaty, so far as they related to the international guarantee.

Such was evidently the status of the canal from the time of the Convention of Constantinople in 1888 to the beginning of the World War in 1914. It was recognized as subject to international regulation, so far as this was consistent with the British Reservation, but not subject to the international guarantee contemplated in the Suez Canal Convention. As a result of Turkey's alliance with the Central Powers in the World War, Great Britain assumed the formal "protectorate" over Egypt, and the title of "Sultan of Egypt" was conferred upon the Khedive, who was relieved from further allegiance to the Sultan of Turkey. The protection of the Suez canal was left entirely to the British armies; and the position that England had assumed during the period of her occupation was confirmed, and the terms of her reservation remained in force. The British protectorate continued from December, 1914, to March, 1922.

§ 7. Status of the Canal under the New Egyptian State

After the World War, the Nationalist agitation in Egypt caused grave anxiety to the British government. To meet the increasing and riotous demands of the Nationalist party, it was finally decided to entrust the task of restoring law and order in that distracted country to the conciliatory skill of the English Field Marshal, Lord Allenby, who showed something of the remarkable ability hitherto displayed by Lord Cromer. In the meantime, a commission was appointed under Lord Milner to proceed to Egypt to investigate and report upon the existing conditions. The report of Lord Milner was decidedly in favor of abolishing the protectorate; but it failed to provide for any adequate protection of British and foreign interests, and for safeguarding the Suez canal. The report was consequently rejected; the protectorate was continued, and Lord Allenby remained as the British High Commissioner in Egypt.

It is to the high honor of Lord Allenby that a compromise was framed that seemed to satisfy the demands of all interested parties. To satisfy the National aspirations of the Egyptian people, it was provided that the protectorate be abolished, and that Egypt be endowed with the rights of a sovereign state; that the Egyptian Sultan should be honored with the title of King; that Great Britain should guarantee the new Egyptian state against the encroachment or interference of any other foreign Power; and that the influence of British officials within the new states should be reduced to the minimum. On the other hand, it was provided that Great Britain should retain

the right to protect her own interests and those of other foreign states, and that she "should have the liberty to take the means necessary to secure her lines of communication in Egypt."

The question may arise, How then was the status of the Suez canal affected by the abolition of the British protectorate in the month of March, 1922, and the recognition of Egyptian sovereignty by Great Britain. It is evident that Great Britain could no longer claim exemption from the terms of the Suez Canal Convention by virtue of any reservation she had hitherto claimed during the period of her occupation. Hence, the status of the canal became what it was intended to be by the Powers that convened at Paris and Constantinople—an international thoroughfare, open to all vessels, merchant or naval, in time of peace or war; and subject to the conditions imposed by the great Powers and to the international guarantees which they established by their treaties. The fact that Egypt, as an independent state, granted to Great Britain "the right to protect her own lines of communication in Egypt," conferred upon her no exclusive right to safeguard the Suez canal, because, in the first place, the canal was not, in any proper sense, a British line of communication; and, in the next place, because the new King of Egypt was not a signatory of either of the Canal Conventions, and hence entitled to no part in the disposition of the international right of way within his own domain.

Whatever Great Britain might now see fit to do in the way of protecting the canal from domestic violence or foreign invasion, she would be acting only as one of the Great Powers that had united to make this artificial channel a common passage-way for the

benefit of the world. By abolishing her protectorate in Egypt she had effectively cancelled the reservation that had existed during her occupation; and hence her present position is precisely what it would have been had no reservation ever been made. No longer hampered by qualifying restrictions, it may be said, in conclusion, that the international status of the Suez canal is now indicated by the provisions contained in the Convention of Paris of 1885, and ratified by the Convention of Constantinople of 1888.

CHAPTER VI

INTERNATIONAL RIGHT OF WAY WITH REFERENCE TO THE OPENING OF THE PANAMA CANAL

The policy of the United States, as shown in the speedy recognition of the Republic of Panama and the apparent pressure brought to bear to ensure the opening of a water-route between the Atlantic and the Pacific, was the occasion, at the time, of some doubt as to whether such a policy was entirely consistent with the principles of international law and international morality. That the end which this policy had in view was of transcendent importance to the commercial interests of the world, no one could for a moment deny. The question perhaps lingers in some minds today whether the greatness of the end could justify the use of immoral and illegal means for its attainment. But whether, as a matter of fact, immoral and illegal means were really used by the United States in promoting the interests of international commerce must be decided by an appeal, not simply to the judgment of individuals, but to the moral judgment of mankind, as that judgment is expressed in the accepted principles of international law and morality.

§ 1. The Policy adopted by the United States

It must be evident to the most casual observer that the policy of the United States was not prompted solely by disinterested motives. Every advantage was apparently taken to further the commercial interests of this country and the world. The United States was under no obligation, even though the right existed, to recognize the revolutionary government of Panama so speedily as to make it appear premature, if not precipitant. If the commercial interests of the world had been opposed to such recognition, it would no doubt have been withheld. But as it seemed necessary to further the general interests of commerce, it was granted. The time had evidently come when greater facilities of transit across the Isthmus of Panama seemed necessary. The obstacle which Colombia interposed to the development of these general interests seemed to require a summary mode of procedure for the promotion of the common good. In the absence of any general international authority, the government of the United States, as the representative of the commercial interests of the world, took upon itself the right to carry into execution this summary process. To those who regarded the recognition of the new Republic as unjustifiable, this summary mode of procedure seems to have been an encroachment upon the territorial jurisdiction possessed by Colombia within her own lawful dominions. The question therefore arises: Did the necessity of a commercial canal across the Isthmus of Panama justify the use of such summary proceedings for the purpose of ensuring a canal? In other words, is the right of jurisdiction possessed by one country over its own territory quali-

fied by the commercial rights or interests of other nations? Or, conversely, is there an international right of way which nations may justly claim under certain circumstances, over the territory of their neighbors.

For the solution of this question, we may appeal to (1) the analogies afforded by the positive law of different countries; (2) the opinions of the great text-writers on international law; (3) the authority of precedents embodied in international treaties and conventions; (4) the great expansion of the world's commerce which required a new line of transit; and (5) the concurrent judgment of civilized nations.

§ 2. The Analogies afforded by the Municipal Law

The appeal to the common or statute law of any particular country, or to any number of countries, cannot of course furnish any conclusive evidence of what constitutes a positive rule of international law. It can at most only indicate what has been the general sense of justice in determining similar relations between the individual members of society.

So far as these individual relations are analogous to those existing between states, the mode in which they are regulated may, perhaps, suggest to us what justice seems to require in the control of international relations. This consideration receives additional force from the fact that international law, like the municipal law, is based upon the idea that nations, like individuals, are moral persons, who are amenable to each other and to the community to which they belong. This consideration is still further strengthened by the

fact that in its historical development international law has derived a large part of its conceptions regarding the essential and conventional rights of nations from the civil rights of property and contract. The international law regarding national dominion is not only analogous to but, to a certain extent, derived from the civil law regarding individual property.

When we consider the civil right of property, and the extent to which this right may be restricted and qualified by the rights and interests of others, including the interests of the whole community, we may at least form some inferences as to how the right of dominion possessed by one nation should, according to the principles of justice, be restricted and qualified by the rights and interests of other nations, and of that community of nations of which each country forms a part. It is unnecessary to emphasize the various modes in which the rights of individual property are restricted and qualified by the fact that the individual is a member of a community having related rights and interests. The liability of individual property to taxation, to police restrictions, to the exercise of the right of eminent domain, is not due to the disposition on the part of the state or community to encroach unjustly upon the right of property, but rather to maintain the existing rights of the community, which are quite as essential and sacred as the rights of the individual.

It is, of course, easy to draw unwarrantable conclusions from the analogy between the right of individual property and the right of national dominion. The individuals of a community are under a common state authority, while the nations of the world are under no such coercive power. There is no sovereign

international power which can institute condemnation proceedings for the establishment of a right of way. In the international society each nation is the judge and prosecutor of its own rights. Still the rights possessed by the nation are determined largely by the same principles of natural justice, as those which determine the rights of individuals in an organized political society. And we may reasonably claim that the moral principle upon which the state may claim a right of way over an individual estate is not fundamentally different from that upon which the world at large may justly claim a right to pass over a natural line of commerce within a nation's dominion.

§ 3. The Opinions of Publicists on International Law

But if we would consider more definitely the question before us we must appeal to something more conclusive than the analogies afforded by the municipal law. We must look to the principles of the international law itself, and to the considerations of justice by which international relations are determined. To ascertain these principles we may consult the authority of certain great text-writers whose opinions have carried with them unusual weight in determining the justice of international relations. We shall find in the writings of these jurists the expression of definite opinions in respect to the relativity of the right of national dominion, and the extent to which the jurisdiction of one country over its territory may be qualified by the rights and interests of other nations.

Grotius, who still retains the honor of being the founder of international law as a science, deduces the

right of national property and dominion from that primitive condition of mankind in which all things were common, and declares that the institution of property has not entirely destroyed the original and equitable rights which were common to all. "Let us consider," he says, "whether men have a common right to those things which are already made private property. Some may think this is a strange question, since property seems to have absorbed all the rights which flowed from the common state of things. But this is not so. For we must consider what was the intention of those who introduced private property; which we must suppose to have been to recede as little as possible from natural equity. . . . And so land and rivers and any part of the sea which is become the property of any people, ought not to be shut against those who have need of transit for just cause. . . . Transit is to be granted not only to persons, but to merchandise; for no one has a right to impede one nation in cultivating trade with another remote nation; for it is of advantage to the human race that such intercourse should be permitted." (Grotius, *De Jure Belli ac Pacis,* Bk. II, ch. 3.)

Vattel, whose authority is perhaps more often quoted than that of any other great publicist, expounded more fully the principle laid down by Grotius regarding the relativity of the right of national domain, emphasizing what he calls "the rights retained by all nations after the introduction of domain and property. . . . The introduction of property cannot be supposed to have deprived nations of the general right of traversing the earth for the purpose of mutual intercourse, of carrying on commerce with each other, and for other just reasons. It is only on particular

occasions when the owner of a country thinks it would be prejudicial or dangerous to allow a passage through it, that he ought to refuse permission to pass. He is therefore bound to grant a passage for lawful purposes, whenever he can do it without inconvenience to himself. And he cannot lawfully annex burdensome conditions to a permission which he is obliged to grant and which he cannot refuse if he wishes to discharge his duty and not abuse his right of property."

In regard to the jurisdiction, for example, over straits, Vattel says: "That when they serve as a communication between two seas, the navigation of which is common to all or several nations, the nation which possesses the strait cannot refuse to others a passage through it, provided that passage be innocent and attended with no dangers to herself. By refusing it without just reasons, she would deprive those nations of an advantage granted them by nature." (Vattel, *Law of Nations,* Bk. I, ch. 23; Bk. II, chs. 2, 9, 10.)

It must not be supposed that the above quotations from such venerable writers are intended to indicate what has been accepted as the positive law of nations. They do, however, express the highest authority regarding the fundamental rights and duties of nations in respect to one another. In other words, they declare the principles of justice and equity which form the basis of international law. These writers, who belong to what is called the "rational school," treated law from an *ethical* point of view; and, hence, their views are often chiefly valuable as expressing the moral duties of nations rather than their legal rights. It may be claimed that the opinions of text-writers do not constitute an ultimate authority in respect to

international rights, that while their opinions may indicate what are the principles of international justice, they do not establish the positive rules of international law. This claim cannot be denied. No publicist, however distinguished he may be, possesses the authority to legislate for the world. It is entirely true that the principles of international justice are legally binding only so far as they have been sanctioned by the consent of nations. It is also true, however, that the principles of justice furnish a proper basis for a nation's policy in its dealings with other nations, and for insisting by diplomatic means upon a recognition of its own natural rights and essential interests. It is furthermore true, that, as the result of diplomatic claims and negotiations, the principles of justice have gradually received the assent of nations and been embodied in positive international law in the form of treaties and conventions.

§ 4. Precedents of International Treaties and Conventions

It remains for us, therefore, to inquire how far the principle under discussion—namely, that the right of a nation's jurisdiction over its own territory is qualified by the right of commercial transit which according to justice is due to other nations—has been accepted in international practice and sanctioned by international treaties. The examples of this sanction are so numerous that it is possible to select only a few cases, which are more or less familiar to every student of international history.

The first and most patent illustration of the fact that mankind retains certain common rights which

cannot justly be appropriated by one nation to the exclusion of others, is seen in the futile attempts once made to exercise an exclusive jurisdiction over the sea. The pretentious claims of Venice to the Adriatic, of England to the neighboring seas, of Portugal to the Gulf of Guinea, and the Indian Ocean, of Holland to the route by way of the Cape of Good Hope to the Philippine Islands, have now scarcely more than an historical interest. The growth of the world's commerce has dissipated these claims, and has shown that the transit over the sea, at least, is a right common to all nations—a right which has become sanctioned by universal consent and incorporated into the body of international law.

The attempt of certain countries to assume exclusive control over the narrow seas and the straits connecting navigable waters, or to place obstructions to the free use of such lines of commerce, has also led to the protest of other countries and to the abandonment of such attempts. The claim of England to the dominion of the British channel called forth the famous discussion between Selden and Grotius, and provoked a vigorous protest on the part of France, resulting in a war between France and England and the ultimate abandonment of the British claim.

The exclusive jurisdiction over the straits connecting the Baltic and the North sea was formerly claimed by Denmark, a claim based upon immemorial prescription and also upon treaty recognition. As a result of this claim, Denmark imposed exorbitant tolls upon all vessels passing through these straits. With the growth of modern commerce these exactions became increasingly irksome, and aroused in other na-

tions the conviction that the so-called "Sound Dues" were contrary to justice and should not be recognized as obligatory. Denmark found herself unable to levy these dues upon vessels passing through a natural highway of the world's commerce, and in the treaty of Copenhagen (1857) finally renounced them. In this treaty the powers refused to recognize the right of Denmark to levy these dues, but gave a capital sum on the condition that she maintain lights and buoys, in order to render these channels safe for general commerce. In this case the nations of Europe asserted their common right of way through straits the dominion of which professedly belonged to Denmark. (Woolsey, *Int. Law,* 5th Ed. p. 79.)

In a similar way the exclusive jurisdiction of Turkey over the Dardanelles and the Bosphorus has been restricted by the commercial interests of other nations. These straits were at first within the proper domain of the Ottoman empire, and as long as Turkey alone had any commercial interest in their use, no attempt was made to limit her jurisdiction. But when Russia also became a proprietor of the shores of the Black sea, the legal rights of Turkey became limited by the equitable commercial rights possessed by Russia. In 1774 Russia enforced what she regarded as her just claim, and compelled Turkey to open these straits to the passage of merchant vessels, and this act received the sanction of other European powers. By the Treaty of Adrianople in 1829 entrance through the straits into the Black sea and the navigation of this sea were admitted to belong to Russia and to powers friendly to Russia. The extent to which the jurisdiction of Turkey over these waterways is restricted by the commercial interests of other nations is fur-

ther evident from the supervision exercised over them by the Treaty of Paris of 1856, and the Treaty of London of 1871, whereby these lines of transit were opened for purposes of commerce to all nations.

The international right of passage through a strait connecting navigable waters has also been asserted by the United States in the case of the Straits of Magellan. In 1879 Secretary Evarts wrote: "The government of the United States will not tolerate exclusive claims by any nation whatsoever to the Straits of Magellan, and will hold responsible any government that undertakes, no matter what the pretext, to lay any impost or check on United States commerce through those straits." (Moore's *Digest,* Vol. I, p. 664.)

As a result, therefore, of negotiations and treaties the accepted modern principle has come to be "that the waterway between open seas is an adjunct of the seas themselves, and may be navigated as freely as they." (Lawrence, *Principles of Int. Law,* p. 180.) These illustrations are sufficient to show that the international right of way over the high seas and straits connecting navigable waters, in spite of the claims of exclusive jurisdiction on the part of any nation, is not only consonant with reason and justice, but sanctioned by international practice.

But it may be said that the waterways already referred to are so intimately connected with the navigation of the high seas as to render it questionable whether a real dominion or right of property over such waterways could ever have been, in the first instance, justly claimed. Let us then take the case of a navigable river which unquestionably belongs to the country through whose territory it flows. The ques-

tion is then presented whether the exclusive jurisdiction over such a river within the territory and dominion of one nation may be qualified by the commercial rights and interests of other nations, that is, whether other nations may justly claim a right of way over such a river. The government of the United States has been called upon to assert such a claim, and has obtained by treaty the right of way demanded.

This well-known controversy occurred in 1826 between the United States and Great Britain regarding the navigation of the lower St. Lawrence. The claim of the United States was based upon the grounds of natural justice and the obvious need of its citizens for a commercial water-route to the sea. It was, however, still further fortified by an appeal to the treaty of Vienna, which in 1815 had been concluded between the principal nations of Europe, to which Great Britain herself was a party, and in which it had been stipulated that the chief rivers of western Europe—the Rhine, the Necker, the Moselle, the Meuse, the Scheldt and the Elbe—should be free to all nations. Great Britain, however, refused at the time to recognize the force of the arguments advanced by the United States in the case of the St. Lawrence, but afterward as the result of negotiations, conceded the claim; and by the Reciprocity Treaty of 1854 and the Treaty of Washington of 1871, the British portion of the St. Lawrence was thrown open forever to the citizens of the United States. In this case the right of way was claimed only by the United States, since no other nation was especially interested in the navigation of this river. (Moore's *Digest,* I, pp. 631-635.)

But in the case of other rivers, the navigation of which has been beneficial to many countries, the right of passage has been thrown open to the world. Not only the rivers of western Europe, before mentioned, were made free by the Treaty of Vienna in 1815, but the Danube was opened by the Treaty of Paris in 1856. The Amazon was declared free by a proclamation of the Emperor of Brazil in 1867; and the West African Conference in 1855 declared the Congo and the Niger open to the merchant ships of all countries. So universal has this practice become that the jurisdiction over nearly all the arterial rivers of the world, which afford a natural highway for the world's commerce, has become subject to the common right of way possessed by all nations. (Lawrence, *Int. Law,* pp. 186–189; Bluntschli, sec. 314; Calvo, sections 215, 229, 230; Hall, *Int. Law,* 4th ed., pp. 137–142; Wheaton, *Elements,* pt. ii, ch. 4, sec. 11; Phillimore, *Int. Law,* I, sections 194–210. De Martens, *Précis,* Sec. 84, claims that a nation under certain conditions has the right not only to demand, but if need be to force a passage, for the sake of commerce.)

Of course it may be claimed that the grant of a right by treaty, or the free consent of a nation, does not prove that the legal right existed before the grant was made. This is true. But when a right is claimed as a matter of justice, the grant of the right generally involves an express recognition of the justice of the claim. Especially is it true that when the right of way over those waters of the globe which form the natural pathways of commerce has been conceded by all interested countries, such a concession shows that the right heretofore claimed by international jurists

as a natural right, that is, one founded in justice, has become sanctioned by the highest authority by which any international right can be sanctioned, namely the consent of nations. That no nation has, therefore, such an exclusive right to its own territory as to obstruct the general commerce of the world, seems to be a doctrine not only supported by the analogies of the municipal law and the authority of international jurists, but incorporated into international practice and sanctioned by international treaties.

§ 5. The Great Expansion of International Commerce

With the great expansion of the world's commerce the time had evidently come when the general interests of the world required other lines of transit than those afforded by natural waterways. When a narrow isthmus furnishes the natural means for a line of communication between two navigable seas, a new and serious question arises as to the extent to which the exclusive jurisdiction of a single nation over such a pathway of commerce is affected by the commercial interests of other nations. Such a problem might perhaps require the establishment of a new rule of law; but it does not seem to require the application of a new principle of justice. We have seen that, in the common judgment of mankind, the right of individual property and of national domain is justly subject to limitations, for the maintenance of the common interests of the larger community of which the individual or the nation forms a part. This principle of natural justice has been equally applied to all the waterways of the globe in which the commercial interests are not restricted to a single country.

It is true that an artificial channel through an isthmus is different from a natural channel through a strait or river. But they may both equally form a necessary line of communication for the benefit of the world. So far as they are alike, they must be subject to the same principle. If the jurisdiction over a strait or a navigable stream, which is necessary for general commerce, is subject to an international right of way, it seems to follow that the jurisdiction over a narrow isthmus which is equally necessary for general commerce, should also be regarded as qualified by a similar international right. It may be claimed that the passage through a strait is an "innocent passage" entailing no injury upon the proprietor; but the passage over an isthmus may be equally "innocent" if a fair compensation is proffered for any injury done. In both cases the moral obligation on the part of the sovereign of the territory to grant such a passage, and the moral right on the part of other nations to claim the use of such a passage, seem to be correlevant. So far as the principle of natural justice then is concerned they both rest upon the same basis.

But it may be questioned whether, because in the one case the moral right has been legalized by the consent of nations, the moral right in the other case has also become legalized without such consent. In the first case, force may be exercised to maintain a right already granted by treaty, while in the second case it may well be doubted whether force may be legitimately used to maintain a moral claim, which has not yet been legalized by a treaty stipulation.

But the progress of international law is seen in the gradual transforming of moral duties into legal duties, when their fulfillment on the part of one nation is

necessary to secure the rights of other nations. This is evident, not only in the instances already cited in regard to the jurisdiction over seas, straits and rivers, but also in the case of the isthmus which first came to have a world-wide commercial importance, namely the Isthmus of Suez. The early negotiations regarding the opening of this isthmus proceeded upon the theory that the territory was under the exclusive jurisdiction of the Khedive of Egypt, subject only to the suzerainty of the Sultan of Turkey. But it soon became apparent that the jurisdiction of this territory was qualified by the equitable rights of other nations. And these equitable rights, or moral claims, furnished the basis of a legal right of way over the isthmus of Suez for the benefit of all nations, finally sanctioned by the International Commission at Paris in 1855 and the Convention at Constantinople in 1888.

A nation's policy is thus by no means limited to enforcing its strictly legal rights. It is directed quite as much to obtaining its just claims, whether already recognized or not, and to promoting its own essential interests as well as the common interests of the world. The international policy of a nation is based upon its own conceptions of international justice. It is grounded upon its moral right to defend and maintain its own interests against the opposing interests of other nations. It is, in fact, only through these efforts of different nations to maintain and adjust their mutual and conflicting interests that international law itself comes into existence. What has already received the assent of nations is brought within the sphere of law; but what has not yet received that assent remains within the wider field of policy. It is, therefore, evident that the international policy of a people,

even though not yet sanctioned by law, may be in perfect accord with international morality and the natural principles of justice.

The fact, therefore, that the international right of way across an isthmus may not yet have been legalized by the general consent of nations, does not render a policy immoral or unjust which has for its end the securing of such a right. Neither can such a policy be regarded as even illegal, provided it does not tend to infringe upon rights already legalized. On the other hand, the justice of such a policy is evident from the current judgment of mankind that the jurisdiction of a nation over its own territory is not absolute, but qualified by the commercial rights and interests of other nations. The justice of such a policy is also evident from the necessity of utilizing for the benefit of all the world a means of communication which, if not thus utilized, is of little benefit to the possessor. It is still further evident from the fact that the obstruction to such a means of transit is itself unjust and injurious to the commercial interests of other nations, and that the one who without reason obstructs such means of transit fails to fulfill his moral obligations to others, and, so far as that act is concerned, forfeits the moral support of mankind.

§ 6. The Concurrent Approval of Civilized Nations

The final consideration which may be mentioned to justify the policy of the United States in the case of Panama, is the fact that it received the concurrent approval of the civilized nations of the world.

The claims of Colombia that this policy was strictly

and technically contrary to law, scarcely needs any very serious comment. These so-called legal claims may perhaps be briefly stated and succinctly answered as follows: (1) The claim that the United States by its acts encroached upon the territorial sovereignty of Colombia, when, in fact, the professed sovereignty, which Colombia claimed to exercise over Panama, was a palpable and illegal usurpation upon the real sovereignty and independence already possessed by Panama, according to the Constitution of 1863. (2) The alleged fact that the United States instigated the revolutionary spirit in Panama in 1903, and was premature in recognizing the new republic—when, as a matter of fact, during the previous fifty-seven years there had been no less than fifty-three revolutions against the existing government, instigated by the people themselves, including a recent one that had lasted for three years before the new republic was recognized. (3) The charge that the United States was delinquent in not aiding Colombia in suppressing the revolution of 1903, according to the provisions of the Treaty of 1846, which, besides guaranteeing to the United States (to quote its words) "the right of way or transit across the isthmus of Panama, for any mode of communication that now exists or may hereafter be constructed," also provides that "the United States guarantee the rights of sovereignty and property which New Granada (that is, Colombia) has and possesses over the said territory," which latter provision has been repeatedly and officially interpreted as not referring to protection against domestic violence. (4) The charge that the United States used its naval power to prevent the Colombian forces from suppressing the revolution of 1903. While it is true that

the American gunboat (the *Nashville*) was stationed in the vicinity of the isthmus, it also seems to be a fact that this force (consisting of 43 marines), was used only to occupy Colon and prevent the military use of the line of transit across the Isthmus already guaranteed to the United States, and to protect American lives and property which might thereby be endangered.

But these ostensible points of law do not affect the justice of the general policy of the United States, which was approved by the civilized nations of the world. This fact has not apparently received its due significance. It must be conceded that it is the consent or approval of civilized nations that constitutes the source from which the "Law of Nations" derives its ultimate authority. In our present state of civilization there is evidently no such thing as a "superstate" which can make laws for the world at large. The law that controls international relations must, of necessity, come into existence without a supreme legislature. It cannot, in any proper sense, be said to be *enacted* like the municipal law. Both of these kinds of law—municipal and international—doubtless are or should be founded in justice; but justice does not emerge spontaneously into law. In the one case, it must be expressed through a constituted government. In the other case, it must be expressed in some other way than through a constituted government. As it is true that there is no such thing as a "superstate," it is equally true that no single independent state can control international relations. Hence, the only authority possessed by international law is derived from the concurrent approval of different independent states.

The bearing of these statements upon the character of a nation's policy may no doubt be readily seen. If the binding force of international law is to be judged by the extent that it receives the approval of civilized nations, then the justice of a nation's policy may be judged in the same way—that is, by the extent that it receives the approval of civilized nations. It must be admitted that the policy of a particular state may not always conform to the requirement demanded by international justice. A nation's policy may be the mere expression of the will or judgment of a single state, looking to its own advancement or its own interests. The spirit of nationality is no doubt one of the strongest motives that inspire the human race. It manifests itself in the emotion of patriotism, in the "love of the Flag" and often leads a people to ignore the welfare of other peoples. The policy of a government which takes account of its own interests without regard to the interests of others—which is stamped with the mark of selfishness and deceit—which uses the arts of diplomacy to infringe upon the rights of its neighbors—which seeks to live and not to let live—does not arouse the plaudits of the world.

But it is a matter of congratulation that the love of country is not always inconsistent with the love of humanity. There may be interests belonging to the world at large which may be espoused by a single people. When such a people takes upon itself the burden of advancing the cause of civilization, it assumes a responsibility that civilized nations are willing to acknowledge.

There are few world-interests of greater concern to the human race than the promotion of the world's

commerce, and the giving to all peoples freedom of access to the natural lines of commercial communication. Such was the aim of the United States in the case of Panama. The policy of the American government had for its ultimate end the commercial interests of mankind; and no personal considerations, or political intrigue, or legal devices could obscure this as its primary purpose. Having this purpose in view, it received the approval of civilized nations. Thus, to the policy of a single government was given in this case the same kind of sanction for its justification as that upon which the "Law of Nations" itself depends for its authority.

How this approval came to be given is a matter of history. The specific and primary end of the government's policy was, of course, the opening of a water-route across the American continent. It reached its crucial stage in the recognition of the new republic of Panama. It therefore remained for foreign powers to determine how far this new water-route and the recognition of this new republic involved the interests of other nations. The concrete problem thus presented to these powers was the question whether the recognition of the new republic should or should not be approved. As the facts with reference to this approval and the promptness with which it was accorded may not be clearly in mind, the following statement is made as a reminder of these facts: The United States recognized the Republic of Panama on November 14, 1903. There followed in rapid succession, in the same month of November—the recognition by France, China, Austria-Hungary and Germany. There succeeded in the following month of December, in the order here given—the recognition by

Denmark, Russia, Norway and Sweden, Belgium, Nicaragua, Peru, Cuba, Great Britain, Italy, Japan, Costa Rica and Switzerland.

This list comprises seventeen nations of the world, including the six great powers of Europe. It is a question whether such an unanimous confirmation of a nation's policy was ever given in the same space of time. The remarkable concurrence of action on the part of the civilized nations of the world, whose combined sanction was the source of international law, was the authentic seal of approval upon the policy of the United States and vindicated, as nothing else could do, the international right of way across the Isthmus of Panama.

CHAPTER VII

THE SALE OF MUNITIONS OF WAR IN ITS RELATION TO THE LAW OF NEUTRALITY

The subject of neutrality holds a large place in modern treatises on international law. The term "neutrality" always assumes the existence of a state of war; and refers to the status of those nations that are not engaged in the war. The law of neutrality in general includes the rights and duties of such nations in their relation to the belligerent powers. It grants to the neutral nations the right of territorial inviolability against the hostile acts of either belligerent; it also imposes upon each neutral nation the duty of preventing its territory from being used for hostile purposes, and moreover imposes the duty of strict impartiality toward the belligerents. The law especially lays down the rules that must be observed by neutrals in naval warfare—rules that relate to the carrying of contraband goods; to the observance of a blockade; to the refraining from unneutral service; and to submitting to the right of visit and search by belligerents.

The special relation of the law of neutrality to the sale of munitions of war, which we are now considering, may perhaps be conveniently discussed by referring to: (1) the early theory of neutrality in the eighteenth century; (2) the American doctrine as followed during the first administration; (3) the devel-

opment of a definite and permanent policy by the United States; (4) the distinction between the liability of neutral states and of neutral subjects; and (5) the questions arising as to the sale of munitions during the late war.

§ 1. The Law of Neutrality in the Eighteenth Century

The law of neutrality, it may be well to say at the outset, is of comparatively modern origin. It seems that at the time of Grotius no attempt was made to lay down any general rules regarding the duty of neutrals toward belligerents. In his great work published in 1625 this eminent writer does not use the terms "neutrals" and "neutrality." He was also far from recognizing the modern rule of strict impartiality; and distinguished between the obligations of a neutral toward a belligerent waging a *just* war and one waging an *unjust* war. But a far more important distinction drawn by Grotius was that relating to the kind of goods belonging to a neutral which were liable to capture by a belligerent. In this he may be said to have laid the basis for the modern law of "contraband"—though he does not use this term. It must be observed that in the first class, which we call "absolute contraband," he includes munitions of war. It must also be observed that the restriction which he places upon the furnishing to a belligerent of articles in this class, is their liability to capture by the belligerent. He thus recognizes the fact that the prevention of the furnishing of munitions of war is a belligerent right and not a neutral duty.

It is to Vattel that we are indebted for the clearest

and most explicit statement of the law of neutrality as it existed in the eighteenth century. His book on the "Law of Nations" was published in 1758. The chief defect in his conception of neutrality was the approval of a general custom of his time to the effect that a neutral might afford pecuniary or military assistance to a belligerent, provided it was in accordance with a previous treaty stipulation—a rule which formerly went under the name of "imperfect neutrality." but which is no longer recognized. For our present purpose the most significant part of Vattel's chapter on neutrality is that which discusses the subject of neutral trade in its relation to the sale of munitions of war.

In the first place, he holds that neutrals are under no obligation to renounce their commerce, even in the matter of furnishing a belligerent with war supplies, provided they are willing to furnish similar supplies to the other belligerent. In the next place, he calls attention to the fact that the carriage of war supplies to one belligerent exposes the owner of the goods to the risk of having his commodities captured by the other belligerent, who has a right to make such a capture. Again, after defining contraband goods as "commodities particularly useful in war," such as arms, ammunition, etc., he states that the means of preventing their transportation to a belligerent is the confiscation of such contraband goods when captured by the enemy, and asserts that the owner by assuming this risk thereby forfeits the protection of his own government. Especial attention is called to the fact that Vattel is careful to discriminate between the liability of neutral subjects and the responsibility of neutral governments in the matter of carrying contra-

band goods. He shows on the one hand, that the confiscation of such goods, when carried by neutral subjects, is permissible; but, on the other hand, that neutral governments are not held responsible for the carrying of contraband goods by their subjects. In the whole of Vattel's treatise there is not a hint that the prevention of the traffic in contraband goods is a duty on the part of a neutral state. It is a matter that affects solely the interests of a belligerent, to whom is given the right of confiscation. (See Vattel, *Law of Nations,* Bk. III, ch. 7.)

It was the purpose of the publicists of the eighteenth century to protect as far as possible the freedom of neutral commerce, by restricting the belligerent right of capture to contraband articles. But the rules laid down by these writers were often disregarded by belligerent Powers. Nations were seeking to advance their own interests rather than to conform to any legal rules. Hence, the rights of neutral commerce were sought to be protected only by those whose interest it was to do so. In 1780 the alliance known as the "First Armed Neutrality," was formed by several European Powers under the leadership of Russia, professedly to resist the maritime pretensions of England. This alliance was committed to the defense of the following rules: (1) all neutral vessels may freely navigate from port to port; (2) enemy's goods shall be free from capture in neutral vessels, except contraband articles; (3) such contraband articles shall be restricted to munitions of war; and (4) a blockade must be maintained by an adequate force.

It will be seen that these rules were substantially the same as those afterward adopted in the Declaration of Paris in 1856 after the Crimean War. They

were intended to protect the freedom of neutral trade. The commerce of neutrals was to be free from the customary depredations of belligerent Powers. The only restrictions to which neutral commerce should be subject would be the liability to capture and condemnation by a belligerent for the carriage of contraband or the breach of blockade. As contraband goods were made to include munitions of war, consequently the only restraint upon the exportation of munitions of war from a neutral country to one of the belligerents would be their liability to capture and condemnation by the other belligerent. It was not expected, nor was it indicated in these rules, that any neutral country would be under obligations to prevent the exportation of such munitions of war to a belligerent —such an act being treated not as an infraction of neutrality, but simply as an offense against the belligerent.

The development of the law of contraband, whereby articles useful in war found in a neutral vessel and destined to the port of one belligerent may be seized and confiscated by the other belligerent, illustrates the inevitable conflict between belligerent and neutral rights in time of war. The belligerent naturally feels that he has a right to conduct the war against his adversary unimpeded by any interference by a third party, that the furnishing of contraband articles to his enemy is such an interference, and should consequently be stopped. The neutral, on the other hand, proceeds on the theory that war respresents an abnormal condition; that he should not be compelled to restrict the normal commerce of his own citizens because a war is somewhere in progress; that a commerce which is legitimate in time of peace should not

be sacrificed in time of war at the behest of a belligerent Power; that his position as a neutral is not affected, provided he is impartial in furnishing supplies to both belligerents; and, finally, that the attempt to regulate the commerce of his own citizens in the interests of either or both belligerents, would involve a responsibility and a burden that, as a neutral, he ought not to be compelled to assume.

Here is evidently a conflict of rights claimed respectively by belligerents and neutrals. How may this conflict be adjusted? Only by some sort of compromise. This compromise has been effected by the practice of nations, which has become an accepted principle of international law. This principle is embodied in the law of contraband. By this law, the neutral nation is under no obligation to place any restraint upon the private commerce of its own citizens in the interest of belligerent parties; but, on the other hand, all neutral vessels are subject to the exercise of the right of visitation and search, and of condemnation if found carrying hostile goods to a hostile destination. However much the list of "contraband articles" may change from time to time, it always contains, as absolute contraband, those articles which are classed as munitions of war; so that what may properly be said regarding the sale, exportation, the capture and condemnation of contraband articles, applies to the sale, exportation, the capture and condemnation of munitions of war.

§ 2. American Policy under the First Administration

At the close of the eighteenth century the practice of nations was by no means uniform, and the law of

neutrality was, as a matter of fact, often disregarded. It was the policy of the United States, more than any other single influence, that tended to give definiteness to this branch of international law. In the midst of European wars that followed the French Revolution, the United States was the chief neutral nation whose commercial rights were placed in jeopardy. The year 1793 may be said to form an epoch in the history of the law of neutrality. In that year began the series of struggles in which Great Britain and France were the chief belligerents, and in which other countries of Europe became involved; and in that same year was also issued President Washington's famous Proclamation of Neutrality. It is unnecessary to rehearse here the story of the appearance on American soil of the notorious French ambassador, M. Genet, and his insolent attempts to make the United States the basis of warlike operations against Great Britain; and of the laudable efforts of Washington to resist these attempts. The United States was at that time the youngest nation of the world; but it was yet a nation with a high sense of honor, and it was the policy of President Washington to maintain the strictest neutrality between the belligerent countries of Europe.

In this policy he was ably seconded by his Secretary of State, Thomas Jefferson. To Genet, who was trying to embroil this country in the European war by fitting out privateers on American soil, Jefferson wrote: "It is the right of every nation to prohibit acts of sovereignty from being exercised by any other within its limits; and the duty of a neutral nation to prohibit such as would injure one of the warring Powers." This single sentence states the fundamental right and the fundamental duty of every neutral state,

namely, the right of every neutral state to prevent its territory from being made the basis of hostilities; and the duty of every neutral state to abstain from hostile acts.

But it is more relevant to our present purpose to call attention to the fact that the United States, at this early date, announced the principle that should guide a neutral nation in respect to the sale of munitions of war. In his Proclamation of Neutrality, published on April 22, 1793, Washington indicated the kind of restrictions to which all trade in contraband goods by neutrals was subject by the law of nations. The words of the Proclamation are: "that whosoever of the citizens of the United States shall render himself liable to punishment or forfeiture under the law of nations, by committing, aiding or abetting hostilities against any of the said [belligerent] Powers, or by carrying to any of them any of those articles which are deemed contraband by the modern usage of nations, will not receive the protection of the United States against such punishment or forfeiture." (*American State Papers, Foreign Relations,* I, 140.)

Here is clearly expressed the usage of international law, as understood by Washington, that the neutral citizen who engages in the carrying of contraband goods, including munitions of war, to a belligerent, does so at his own risk, and thereby forfeits the protection of his own government. The neutral government is this supposed to perform its whole duty by acquiescing in the punishment inflicted upon the offending citizen by the belligerent whose interest it is to prevent the carrying of such goods.

An occasion soon arose for a more definite statement of the principle involved than that contained in

the President's proclamation. In this same year, 1793, Great Britain, without questioning the legal correctness of the position taken in the proclamation, ventured to suggest that it would be more expedient for the Government of the United States to prevent the exportation of arms than to expose vessels belonging to its citizens to those damages which might arise from their carrying articles of the description mentioned. To this suggestion that the United States prevent the sale of munitions, Jefferson made the following explicit reply: "Our citizens have always been free to make, vend and export arms. It is the constant occupation and livelihood of some of them. To suppress their calling, the only means perhaps of their subsistence, because a war exists in foreign and distant countries, in which we have no concern, would scarcely be expected. It would be hard in principle and impossible in practice. The law of nations, therefore, respecting the rights of those at peace, does not require from them such an internal disarrangement in their occupations. It is satisfied with the external penalty pronounced in the President's proclamation, that of confiscation of such portion of these arms as shall fall into the hands of any of the belligerent Powers on their way to the ports of their enemies. To this penalty our citizens are warned that they will be abandoned." (Moore's *Digest,* VII, 25.)

With reference to the historical significance of the policy of Washington's administration, Professor Lawrence, a noted English writer, says: "These proceedings of the United States mark an era in the development of the rights and obligations of neutral Powers. The grounds on which the action of the American government was based are to be found in

the works of the great publicists of the eighteenth century; but never before had the principles laid down by these writers been so rigorously applied and so loyally acted upon. The practical deductions drawn from them by Washington and his cabinet were seen to be just and logical, and the governments of other states followed in their turn the American example." (Lawrence, *Principles,* p. 483.)

In the words of another distinguished English writer, Mr. Hall: "The policy of the United States in 1793 constitutes an epoch in the development of the usages of neutrality. There can be no doubt that it was intended and believed to give effect to the obligations then incumbent upon neutrals. . . . In the main it is identical with the standard of conduct which is now adopted by the community of nations." (Hall, *Int. Law,* p. 616.)

§ 3. The Permanent Policy Adopted by the United States

The question may now arise, whether the acceptance of the principle of international law regarding the sale of munitions approved by Washington and Jefferson, in the early days of our country, was only a temporary feature of the first administration; or whether, and how far, it has since been adhered to by the Government of the United States.

Mr. Webster, while Secretary of State, was called upon to make a reply to the Mexican Government, which had complained of certain alleged violations of neutrality, on the part of citizens of the United States, in the supply of arms to Texas, then at war with Mexico. Mr. Webster said: "It is not the prac-

tice of nations to prohibit their own subjects, by previous laws, from trafficking in articles contraband of war. Such trade is carried on at the risk of those engaged in it, under the liability and penalties prescribed by the law of nations or particular treaties. If it be true, therefore, that citizens of the United States have been engaged in a commerce by which Texas, an enemy of Mexico, has been supplied with arms and munitions of war, the Government of the United States, nevertheless, was not bound to prevent it; could not have prevented it, without a manifest departure from the principles of neutrality. . . . Such commerce is left to its ordinary fate, according to the laws of nations." (Webster's *Works,* Vol. VI, p. 452.)

During the Crimean War, in which the allied Powers of Great Britain and France were opposed to Russia, President Pierce had occasion to touch upon this subject. In his annual message of December 3, 1854, he declared: "The laws of the United States do not forbid their citizens to sell to either of the belligerent Powers articles of contraband of war, or to take munitions on their private ships for transportation; and although in so doing the individual citizen exposes his property or person to some of the hazards of war, his acts do not involve any breach of national neutrality, nor of themselves implicate the government. . . . Thus during the progress of the present [Crimean] war in Europe, our citizens have, without national responsibility therefor, sold gunpowder and arms to all buyers, regardless of the destination of those articles. Our merchantmen have been, and still continue to be, largely employed by Great Britain and by France in transporting troops, provisions and

munitions of war to the principal seat of military operations; but such use of our mercantile marine is not interdicted either by the international or by our municipal law, and does not therefore compromise our neutral relations with Russia." (Richardson's *Messages,* pp. 327, 331.)

The Crimean War furnishes also an instance of the persistence of the United States in holding to its previous policy in regard to the sale of munitions; and it also furnishes an example of the remarkable inconsistency of which Great Britain, one of the Allies, was guilty in this matter. Although receiving herself large supplies of military stores transported in American vessels, the British government saw fit to charge the United States with violation of neutrality for not preventing the transportation of similar stores to Russia. In reply to this charge, Mr. Marcy, then Secretary of State, was led to administer to Great Britain a well-merited rebuke. In a communication to the British Government (October 13, 1855), Mr. Marcy said: "It is certainly a novel doctrine of international law that traffic by citizens or subjects of a neutral Power with belligerents, though it should be in arms, ammunitions and warlike stores, compromises the neutrality of that Power. That the enterprise of individuals, citizens of the United States, may have led them in some instances, and to a limited extent, to trade with Russia in some of the specified articles is not denied, nor is it necessary that it should be, for the purpose of vindicating this government from the charge of having disregarded the duties of neutrality in the present war." (Moore's *Digest,* Vol. VII, p. 957.)

But it may still be a question whether the attitude

of this government in its earlier history regarding the sale of munitions of war by its citizens to belligerents, has continued to be the uniform policy of the United States. That this has, as a matter of fact, been the case will be evident from a reference to the following documentary proofs:

During the French invasion of Mexico the Mexican minister at Washington complained that the exportation, on French account, of military stores was permitted at New York. To this imputation Mr. Seward, then Secretary of State, replied: (December 15, 1862), "If Mexico shall prescribe to us what merchandise we shall not sell to French subjects, because it may be employed in military operations against Mexico, France must equally be allowed to dictate to us what merchandise we shall allow to be shipped to Mexico because it might be belligerently used against France. Every other nation which is at war would have a similar right, and every other commercial nation would be bound to respect it as much as the United States. Commerce in that case, instead of being free or independent, would exist only as the caprice of war." (*Ibid.*, Vol. VII, p. 958.)

President Grant, in his neutrality proclamation of August 22, 1870, during the Franco-German War, expressly declared that: "All persons might lawfully and without restriction, by reason of the aforesaid state of war, manufacture and sell within the United States arms and munitions of war and other articles ordinarily known 'as contraband of war,' subject only to the risk of hostile capture on the high seas."

Secretary Bayard, in reply to a request made by the Haytian Minister at Washington, that the United States, on the strength of certain treaty stipulations,

specifying what articles should be regarded as contraband, should take steps to prevent the exportation of such articles of war to Hayti, said: "It is not unusual to find in the treaties of the United States specifications of what things should be regarded as contraband of war between the contracting parties. Such provisions, however, have never been held to bind either government to prevent its citizens from exporting such things to the other country under any circumstances whatever. The United States have uniformly maintained the position taken by Mr. Jefferson, as Secretary of State, that 'our citizens have always been free to make, vend and export arms.'" (*Ibid.*, Vol. VII, p. 964.)

In 1891 Secretary Blaine was informed by the Chilean Minister that an agent of certain insurgents in Chile had arrived in the city of New York for the purchase of arms and munitions of war; and the request was made to him that the shipment of such articles be prevented by the United States Government. To this request Mr. Blaine replied: "The laws of the United States on the subject of neutrality . . . while forbidding certain acts to be done in this country which may affect the relation of hostile forces in foreign countries, do not forbid the manufacture and sale of arms or munitions of war. I am, therefore, at a loss to find any authority for attempting to forbid the sale and shipment of arms and munitions of war in this country, since such sale and shipment are permitted by our law. . . . In this relation it is proper to say that our statutes on that subject are understood to be in conformity with the law of nations, by which traffic in arms and munitions of war is permitted, subject to the belligerent right of

capture and condemnation." (*Ibid.*, Vol. V, pp. 964, 965.)

A somewhat similar case occurred the next year in connection with Venezuela, while Secretary Foster was at the head of the Department of State. Mr. Foster had occasion to use almost the same language to the Venezuelan Minister that Mr. Blaine had used to the Chilean Minister. He said: "The sale of arms and munitions of war, even to a recognized belligerent, during the course of active hostilities, is not in itself a hostile act, although the seller runs the risk of capture and condemnation of his wares as contraband of war." (*Ibid.*, Vol. VII, p. 965.)

Many other citations might be made from official documents similar in import to those given above. But special attention is called to the reply of Secretary John Hay to a complaint made by the Envoy Extraordinary of the Orange Free State to the effect that the English Government was drawing large supplies of material, contraband of war, from the United States. The reply of Mr. Hay is especially significant, not only because it agrees with the uniform opinion of his predecessors, but because it refers to the authorities upon which he based his judgment as to the traditional policy of the United States, and its conformity to the principles of international law. Mr. Hay said: "I have the honor to quote from Kent's Commentaries (I, 142) concerning the well established doctrine as to the law of nations on this subject. Chancellor Kent said: 'It was contended on the part of the French nation in 1796, that neutral governments were bound to restrain their subjects from selling or exporting articles contraband of war to the belligerent Powers. It was successfully shown

on the part of the United States that neutrals may lawfully sell at home to a belligerent purchaser, or carry themselves to the belligerent Powers contraband articles subject to the right of seizure in transit. . . . The right has since been explicitly declared by the judicial authorities of this country.' Mr. Justice Story in the case of *The Santissima Trinidad* (7 Wheaton 340), used the following language: 'There is nothing in our laws or in the law of nations that forbids our citizens from sending armed vessels as well as munitions of war to foreign ports for sale. It is a commercial adventure which no nation is bound to prohibit, and which only exposes the persons engaged in it to the penalty of confiscation.' In the case of *The Bermuda,* Chief Justice Chase said: 'Neutrals in their own country may sell to belligerents whatever belligerents may choose to buy. The principal exception to this rule is that neutrals must not sell to one belligerent what they refuse to sell to another.' . . . An examination of Wharton's Digest of International Law (section 391), will make it clear that the executive departments of this government from the earliest period have maintained the correctness of the doctrine stated by Chancellor Kent and that, in this position, they have been supported by the decisions of the courts of the United States, and by the opinions of eminent authorities on international law.' " (*Ibid.,* Vol. VII, pp. 969, 970.)

From these excerpts from official documents, it appears that the Government of the United States from the beginning of its history has uniformly held to the doctrine, as consistent with international law, that no neutral nation is under obligation to prohibit the sale of munitions of war to a belligerent Power, but

that the penalty for such an act, so far as a penalty is sought, rests entirely in the hands of the offended belligerent. The prevention of the sale and transportation of munitions is, therefore, recognized in international law as a belligerent right, and not as a neutral duty.

§ 4. Liability of Neutral States and of Neutral Subjects

The foregoing statements are sufficient to show that the law of neutrality, as understood by the United States, draws a clear distinction between the liability of a neutral state and the liability of the private citizens of that state. This does not mean that a neutral state, in its corporate capacity, is under no obligations to a belligerent Power. On the contrary, a large part of the law of neutrality, in fact, deals with such obligations. A neutral state, as a state, is obliged by international law not to permit other states to use its territory as a field for military operations, or a basis for the fitting out of military expeditions, or a place for the enlistment of troops. A neutral government, as a government, is also under obligations not to exercise its corporate authority for the benefit of either belligerent in the way of furnishing supplies or the loaning of money. It is evident that the relief of neutral subjects from liability to their own government for the carrying of contraband does not relieve the neutral state itself from its own obligation to other states.

It should also be kept in mind, what seems entirely obvious, that international law lays down the duties which states owe to other states, and not the

duties which subjects owe to their own governments —a matter entirely within the jurisdiction of the municipal law. The subject of a neutral state, is, of course, committing no offense against his own government by the carriage or sale of contraband to a belligerent, and hence is held to no punishment or restriction by his own government. The offense is committed against the belligerent power, and hence the belligerent government only is authorized to punish or prevent the offensive act. The conduct of neutral subjects within the jurisdiction of their own government is controlled solely by the laws of their own governments.

On the other hand, the punishment of the offenses committed by neutral subjects against a belligerent state is left to the discretion of the belligerent government itself. With this matter international law has strictly nothing to do, except so far as the international relation between the states themselves is concerned in that the neutral state is obliged to acquiesce, within certain limits, in the execution of the authorized penalty imposed by the belligerent state.

It will be seen that in the law of neutrality a broad distinction is drawn between the relation of belligerent states and neutral states, on the one hand, and the relation between belligerent states and neutral individuals, on the other. In the one case, the parties are sovereign powers, whose duties to each other may be enforced by diplomacy or war. In the other case, one of the parties is a private person, whose liability is, by universal practice, enforced by a penalty imposed by the belligerent state directly upon the individual person by whom the offensive act has been committed. Upon this distinction is based the whole

law relating to the carriage of contraband goods. Such acts are incidental to private commerce, and so far as they are offensive they affect directly one or the other of the belligerent powers only, and not the neutral state to which the trader himself belongs. The punishment of these acts (so far as they may be regarded as penal), is therefore left to the party most interested in seeking a remedy, that is, the offended belligerent, and not the neutral state.

But it is worthy of note that the carriage of contraband by a neutral individual is not regarded strictly in the light of a criminal offense committed with the conscious intent to injure either belligerent. Neither does the method adopted by the belligerent to prevent the carriage of contraband partake of the character of a penalty inflicted upon the person of the neutral trader. In all such cases, the "penalty" (if it can be properly so called) is restricted to the confiscation of the goods, or of the vessel in which they are carried, or both, or simply to the exercise of the right of preëmption. The person of the neutral trader is immune, and is not liable to any form of punishment like that of a fine or imprisonment.

Notwithstanding the fact that the distinction between the liability of a neutral state and the liability of a neutral individual undoubtedly rests primarily upon an historical basis, the effort is sometimes made to explain this distinction upon scientific grounds—with the evident purpose to justify the maintenance of the custom. With reference to this matter, Mr. Hall has this to say: "An act of the state, which is prejudicial to the belligerent, is necessarily done with the intent to injure; but the commercial act of the individual only affects the belligerent accidentally.

It is not directed against him; it is done in the way of business, with the object of business profit, and however injurious in its consequences, it is not instigated by the wish to do harm, which is the essence of hostility. It is prevented because it is inconvenient, not because it is wrong; and to allow the performance by a subject, of an act not in itself improper, cannot constitute a crime on the part of the neutral state to which he belongs." (Hall, *Int. Law,* 4th Ed. p. 80.)

This explanation, based upon a difference of *intent,* may not perhaps seem entirely satisfactory to one who believes that the furnishing of munitions of war by a neutral individual may operate just as injuriously to a belligerent as though they were furnished directly by a neutral state. The effect of the act in both cases may be the same, an injury to the belligerent state. It seems more reasonable to suppose that the distinction was originally due to the instinctive disposition on the part of the offended government to hold immediately responsible the very party who was guilty of the offensive act. In the one case, the act is considered as a public offense, and the sovereign state is held immediately responsible. In the other case, the act is considered as a private offense, and the private person committing the act is held directly liable. In either case, therefore, the offending party —whether it be a neutral state or a neutral individual—is brought face to face with the offended belligerent, and is made directly responsible for the offense committed. In both cases, the law and international usage have provided a direct and appropriate remedy for the injurious act. In case the act is committed by a neutral state, the law has given to the

belligerent the right to hold the neutral government directly responsible for the injury done. In case the act is committed by a neutral individual, it has given the belligerent the right of visitation and search, and the right of confiscating contraband goods on the judgment of its own admiralty courts.

The continued maintenance of this distinction is no doubt due to the fact that, while primarily based upon the early practice of nations, it has been found to be the most expedient way of reconciling the belligerent right to control the methods of warfare, and the neutral right to preserve the freedom of commerce. It seems evident that the provisions of international law relating to the transportation and sale of contraband goods, including munitions of war, are in harmony with both expediency and equity. The law, as it exists, confers upon the *belligerent* state, the party most interested in preventing such acts, the means to prevent them; and relieves the *neutral* state, the party least interested in preventing such acts, from the obligation to prevent them. It, furthermore, relieves the neutral state from the difficulty, not to say impossibility, of establishing such a universal system of espionage over its own subjects as would make their commercial transactions conform solely to the interests of warring powers. Lord Brougham once aptly said: "No Power can exerecise such an effective control over the actions of each of its subjects as to prevent them from yielding to the temptations of gain at a distance from its territory. No Power can, therefore, be effectually responsible for the conduct of all its subjects on the high seas; and it has been found more convenient to entrust the party injured by such aggression with the power of checking them. This arrangement

seems beneficial to all parties, for it answers the chief end of the law of nations." (Lord Brougham's *Works,* Ed. 1857, Vol. VIII, p. 386.)

In spite of the fact that this doctrine conforms to the early practice of European nations, at least as far back as the eighteenth century, and of the fact that it was accepted by the great publicists of the eighteenth century, and also of the fact that it has uniformly been adhered to by the United States during the whole course of its history, and in spite of the further fact that it has been found to be the only expedient way of reconciling the inevitable conflict between belligerent rights of war and neutral rights of commerce, there may yet remain a doubt in some minds whether it is still recognized as a part of the law of nations. This doubt should be dispelled by reference to the conventions of the Second Hague Conference of 1907. These conventions, so far as they have received the approval of the signatory Powers, must be regarded as the most authoritative statement of the "Law of Nations."

In two separate conventions there is an express declaration with regard to the duty of a neutral Power in respect to the exportation of munitions of war. In the fifth convention, entitled the "Rights and Duties of Neutral Powers and Persons in War on Land," occur these words: "A Neutral Power is not bound to prevent the export and transit, on behalf of one or the other of the belligerents, of arms, munitions of war, or, generally, of anything which can be of use to an army or fleet." Also in the thirteenth convention, entitled the "Rights and Duties of Neutral Powers in Maritime War," occurs the same statement in identical language. These conventions, signed by

the principal countries of the world, Germany, Austro-Hungary, France, Great Britain, Italy, Japan, Turkey and the United States, express a concurrent opinion as to what constitutes the "Law of Nations" in respect to the sale of munitions by neutrals in time of war. (See Convention V, Art 7, and Convention XIII, Art. 7.)

§ 5. Attempts to Evade the Law in the World War

Since the rules of international law are clear and explicit upon this subject, the laying of an embargo upon the sale of munitions of war is sought to be justified upon moral grounds. Notwithstanding the undoubted legal right on the part of a neutral Power to permit the sale of munitions; and notwithstanding the absence of any legal right on the part of a belligerent to demand of a neutral Power to prohibit such sale, it was yet urged during the late war that circumstances may arise in the progress of a war when the continued sale of munitions may work injustice to one or the other of the belligerent parties. In other words, to quote the language of a United States Senator (when the petition for an embargo was presented to Congress): "It may be all right," he says, "to sell these things according to international law but it is against the moral law."

To shift a question of this kind from the domain of law to the domain of morals, opens a wide field for a difference of opinion as to what constitutes a moral international right. It assumes that there exists somewhere some common and accepted standard of conduct by which the moral relations of nations

may be finally determined. As a matter of fact, so far as any such common standard of conduct may be said to exist, it is practically embodied in the law. The law represents the common sense of justice, in so far as the various ideas of a community of persons or of nations have been capable of being put into a definite and corporate expression. The so-called appeal from law to morals may, therefore, mean simply an appeal from a definite and ascertainable body of rules, which represents the organized judgment of a community, to a standard which may be as shifting as the opinions of individuals.

It is true that official protests were made on the part of the Central Powers against the right of neutrals to trade in contraband goods, and especially in munitions of war. Such a protest, of course, when it was made, came from a belligerent who was prompted, not by high moral considerations, but solely by motives of self-interest. He hoped by his protest to obtain some military advantage for himself, or to deprive his adversary of some military advantage. The sale of munitions, it is admitted, is legally available to either belligerent; and so long as each has an equal liberty to purchase, there need be no occasion for complaint. But if one belligerent, by an act of his enemy or other vicissitude of war, finds himself cut off from access to the sea, while his adversary still retains it, he would endeavor to equalize the war situation by seeking to stop all further supply of munitions to his adversary. And, besides this, he would seek to restore himself from a misfortune of war by an appeal to a neutral Power which is in no way responsible for his misfortune.

For example, a nation in expectation of a coming

war and in preparation for it, may have been for many years providing itself with abundant supplies of arms, munitions and other war material, with the intention of surprising its enemy while unprepared for the conflict. It may, perchance, find itself, in the progress of the war, perhaps on account of the superior naval force of its enemy, shut up from ready access to the sea, and estopped from exercising its authorized belligerent right of intercepting the transportation of munitions. Such a nation may, therefore, claim that its enemy, which has been inadequately furnished with war material and especially with those munitions necessary to equip an army, should be prevented from exercising its authorized legal right of supplying itself with further munitions.

Such a claim would evidently be based upon the benefit the belligerent hoped to receive by depriving his enemy of the means of defending himself. But this is not all. The right of intercepting the transportation of munitions of war is by law a belligerent right; and the exercise of this right is by law a belligerent act. Being now prevented himself, by a sheer misfortune of war from exercising his own belligerent right and from performing a belligerent act which really belongs to himself alone, he would impose upon a neutral Power the obligation of exercising this belligerent right and of performing this belligerent act. Strictly speaking, the voluntary assumption on the part of a neutral state, in the interests of a belligerent Power, of the task of preventing the legalized traffic in munitions of war, cannot be looked upon in any other light than as a belligerent, or at least, an unneutral act. On the other hand, a protest on the part of a belligerent Power, which seeks to compensate

itself for a misfortune of war by demanding the services and intervention of a neutral state, has, in fact, no justification in law or in morals.

The late war furnished at least two instances of such a protest or appeal delivered to the United States by the Central Powers. The first was contained in a note issued from the German Embassy at Washington, (April 4, 1915) and directed to the American Secretary of State. Without openly questioning the ordinary application of the rules of international law in permitting the exportation of munitions on the part of neutrals in time of war, the German note asserts that on account of existing circumstances, "the conception of neutrality," to quote its words, "is given a new import, independently of the formal question of hitherto existing law." The circumstances to which the note refers are, first, the unusual supply of munitions which is being furnished; and, secondly, the fact that the supply is one-sided, being furnished only to the enemies of Germany. The note, however, makes no mention of the fact that the law, which is admitted to be still in force, contains no discrimination as to the amount of munitions that may properly be furnished to any belligerent; nor does it take notice of the important fact that the one-sidedness of the supply is due to no act or fault on the part of the United States, but is due solely to a vicissitude of war.

The reply to this note is over the signature of W. J. Bryan, then the Secretary of State. In it the Secretary expresses the opinion that this government, in view of the present indisputable doctrines of accepted international law, would regard the course suggested by the German Embassy as "an unjustifiable de-

parture from the principle of strict neutrality, by which it has consistently sought to direct its actions"; and he respectfully submits that none of the circumstances urged in his excellency's memorandum alters the principle involved. To Mr. Bryan and his advisers is due the credit of adhering to the traditional view of the United States upon the matter in hand.

The second note of protest was issued by the Austro-Hungarian Minister for Foreign Affairs (June 29, 1915) and was directed to United States Ambassador Penfield, at Vienna. It practically concedes that the sale of munitions of war is strictly in conformity with the provisions of the Hague conventions; but states the case of Austria-Hungary as follows: "Although the Imperial and Royal Government is absolutely convinced that the attitude of the Federal Government [meaning the United States] emanates from no other intention than to maintain the strictest neutrality and to conform to the letter of the provisions of international treaties, nevertheless, the question arises whether the conditions as they have developed during the course of the war are not such as in effect to thwart the intentions of the Washington cabinet . . . and whether it would not seem possible, even imperative, that measures be adopted to maintain an attitude of strict parity with respect to both belligerent parties. In reply to possible objections that, notwithstanding the willingness of American industry to furnish merchandise to Austria-Hungary and Germany, it is not possible for the United States of America to trade with Austria-Hungary and Germany, it may be pointed out that the Federal Government is undoubtedly in a position to improve the situation described."

The note suggests that the situation would be improved if an embargo were placed upon the exportation of munitions. The burden of this note, when baldly stated, was that the United States should restore to the Central Powers an advantage they had undoubtedly lost as the result of war by depriving the Allied Powers of an advantage they had undoubtedly gained as the result of war. It thus seeks to "improve the present situation," only so far as the Central Powers are concerned. In short, it calls upon the United States to violate its neutrality and depart from the accepted law of nations by conferring a special benefit upon one of the belligerents.

The reply to this note was drawn by Mr. Lansing, at that time Secretary of State, and dispatched to Ambassador Penfield, at Vienna, August 12, 1915. This reply seems to furnish a complete answer to the position taken by the Austro-Hungarian Government, and to maintain with renewed force the traditional doctrine of international law strictly adhered to by the United States.

Attention is first directed to the claim that the United States should abandon the long-recognized rules governing neutral traffic in time of war, and adopt measures, in the words of the Austro-Hungarian note, "to maintain an attitude of strict parity with respect to both belligerent parties." Mr. Lansing says: "The recognition of an obligation of this sort would impose a duty upon every neutral nation to sit in judgment on the progress of a war, and to restrict its commercial intercourse with a belligerent whose success prevented the neutral to trade with the enemy. The contention of the Imperial and Royal Government appears to be that the advantages gained to a

belligerent should be equalized by the establishment of a system of non-intercourse with the victor."

The Secretary then calls attention to the attitude of the Central Powers themselves under circumstances similar to those existing. He says: "During the Boer War between Great Britain and the South African republics, the control of the coasts of neighboring neutral colonies by British naval vessels prevented arms and ammunition from reaching the Transvaal or the Orange Free State. The allied republics were in a situation almost identical in that respect with that in which Austria-Hungary and Germany find themselves at the present time. Yet, in spite of the commercial isolation of the one belligerent, Germany sold to Great Britain, the other belligerent, hundreds of thousands of kilos of explosives, gunpowder, cartridges, shot and weapons; and it is known that Austria-Hungary also sold similar munitions to the same purchaser."

Mr. Lansing thus indicates that the past practice of the Central Powers does not sustain their present contention. He also shows that: "The general adoption by the nations of the world of the theory that neutral Powers ought to prohibit the sale of arms and ammunition to belligerents would compel every nation to have in readiness at all times sufficient munitions of war to meet any emergency which might arise, and maintain establishments for the manufacture of arms and ammunition sufficient to supply the needs of its military and naval forces throughout the progress of a war." (For this and the preceding correspondence with the Central Powers, see *Special Supplement* of the *Amer. Journal of Int. Law,* July 1915.)

In summing up this discussion the following conclusions seem to be inevitable:

(1) That the custom of regarding all neutral commerce as free, subject only to the belligerent right of visit and search and of confiscation in case of hostile goods with a hostile destination, has existed from the eighteenth century.

(2) That this custom has been recognized by the Government of the United States as a rule of international law from the very beginning of its history until the present time.

(3) That this custom is a part of the general law of contraband, which is based upon the fact that the transportation of munitions of war is injurious only to one or the other of the belligerents, upon whom is conferred the legal means to prevent it; and is in no sense an injury to neutral states, which are therefore relieved of the obligation to prevent it.

(4) That the fact that one of the belligerents has, by a misfortune of war, been deprived from exercising his own belligerent right of intercepting contraband goods on their way to his enemy, does not justify the assumption of this belligerent right by a neutral Power for the sole benefit of the unfortunate belligerent.

(5) That the abolition of this custom would ignore the concurrent judgment of the world as expressed in the Law of Nations, would impose new obligations and oppressive burdens upon every neutral state; would work a positive injustice to every country inadequately prepared for war and compel every nation to be sufficiently armed at all times to meet any possible attack,—a condition of things that would lead to a universal state of militancy and prove a misfortune to the world at large.

CHAPTER VIII

BRITISH DIPLOMACY AND BRITISH COLONIAL REFORM: CANADA, AUSTRALIA AND SOUTH AFRICA

Diplomacy, in the most usual sense, refers to the method or procedure employed in the transaction of business between independent and sovereign states. It may, therefore, be a question whether it should be applied to the negotiations employed in adjusting the relations between a parent government and its dependent colonies. But where a colony forms a distinct body, or community of persons, with a consciousness of rights not recognized by the parent government, it is possible that there may arise a condition of things quite similar to that existing between two independent communities. In either case there may exist a conflict of views that can be settled only by an appeal to arms or an appeal to reason. In an appeal to reason for the adjustment of discordant claims between a government and it colony there may be required the use of methods not essentially different from those required to settle a controversy between two sovereign states.

Such a use of diplomatic methods seems necessary only when the spirit of discontent has reached a stage in which palpable issues are joined between the two parties. There may be presented the ultimate alternative of revolt on the part of the colony or concession on the part of the government—that is, the

spectre of war with the possible loss of the colony, or the use of diplomatic methods to conciliate the discontented people.

There were special reasons that led to the spirit of discontent on the part of the early English colonists. These emigrants from the old country frequently carried with them to their new homes, the traditional spirit of English liberty, and continued to insist upon their rights as Englishmen. This fact, no doubt, directly or indirectly, led to the beginning of the reform of the British colonial system.

§ 1. The Previous European Policy Regarding Colonies

The new colonial policy adopted by Great Britain has been largely the result of a protest or revolt against the older system that generally prevailed among European states. It is hardly necessary to say that modern colonization properly began with the discovery of America and the new sea-route to the East Indies. It was then that Spain and Portugal began the occupation of the newly-discovered lands. To settle the rival claims of these two countries, Pope Alexander VI (in 1493) assumed the prerogative to divide the non-Christian world by an imaginary line, which gave to Portugal the Asiatic lands as well as Brazil and Labrador in South and North America; while the rest of the American continent was granted to Spain. Spain was the most enterprising and successful in taking possession of her newly acquired territory; and to Spain must be given the credit or discredit of founding the modern colonial system.

By the Spanish government, the colonial establish-

ments were regarded solely as a source of profit to the mother country. There was no consideration given to the matter of self-government or to liberty of trade. The love of gold seemed to be the main motive of Spanish enterprise. The local government was almost exclusively in the hands of Spanish officials. All the laws relating to the control of trade, commerce, agriculture, finance, taxation, were made by the home government. In matters of trade and industry the colonies were under the severest restrictions. They could trade with no other country than Spain. The commercial regulations were such as to prevent foreign intercourse, and tended to excite international jealousy.

The pre-eminence of Spain and Portugal during the fifteenth and sixteenth centuries was succeeded by the like pre-eminence of France and England during the seventeenth and eighteenth centuries. The occupation of the St. Lawrence basin and the Mississippi valley by France and that of the Atlantic coast by England, brought these two countries into close contact and bitter rivalry for the possession of North America. The point now to be emphasized is the fact that the colonial policy of these countries was in striking harmony with that already adopted by Spain, so far as it involved the idea that the colonies existed for the commercial benefit of the mother country. The colonists were sent out either directly by the home government or under the supervision of chartered companies, to which was given the monopoly of the colonial trade. On account of the early indifference and neglect of England, the British colonies in America were suffered to develop a certain amount of self-government. But their increasing commercial im-

portance and the need of protecting British merchants from foreign aggressions led the home government to enact certain restrictive legislation in the form of the so-called "navigation laws." By such laws all foreign ships were forbidden to trade with the colonies; no foreigner was allowed to become a merchant in an English colony; no colonial product could be transported to a foreign country or a foreign colony without first paying duty in an English port. The purpose of such laws was to protect the British merchant marine from foreign competition, and to exploit the trade of the colonies in the interest of the mother country.

The protest against this restrictive system was, among other reasons, an important factor leading to the revolt of the American colonies, the success of which was a remote cause of the modification of the British colonial policy.

§ 2. New Policy Adopted in the Dominion of Canada

The first experiment made by England toward the establishment of colonial freedom was due to the peculiar situation resulting from her conquest of Canada.

The long struggle of the French and the English for the possession of North America—culminating in the Seven Years' War, or the so-called "French and Indian War"—was brought to a close soon after the middle of the eighteenth century. By the decisive victory of Wolfe at Quebec in 1759, and the subsequent Treaty of Paris in 1763, England gained the title to all the French possessions in the St. Lawrence

basin, and substantially to all those east of the Mississippi River. The conquest of Canada brought under English rule a body of about 60,000 French people, hitherto enjoying French customs and French laws and devoted to the Catholic religion. To secure the loyalty of this foreign and hitherto hostile population was a serious problem.

The threatening attitude and possible revolution, at that time, of the neighboring English colonies on the Atlantic coast required extraordinary measures to prevent Canada from joining the American cause againt English domination. The conciliatory policy which seemed to England to be demanded by this critical situation was at first embodied in the so-called Quebec Act of 1774. By this act the previous military rule in Canada was abolished and a civil governor was appointed, assisted by an advisory council. But more than this, the act guaranteed the maintenance of the existing French customs and the French civil law, and also recognized the legal status of the Roman Catholic Church—the first official acknowledgment of that religion since the establishment of Protestantism in England. Such formal concessions of civil and religious liberty were unprecedented in English colonial history, and were evidently prompted by a stern necessity; but they proved successful in securing the loyalty of the French people during the distressing period of the American Revolution.

The next step in the growth of the British government in Canada was due to the influx of a large English population, made up of immigrants from the mother country, and reinforced by loyalists from the United States. Since the French already occupied the lower banks of the St. Lawrence, the new population

found settlements on the upper banks of the river and the shores of Lake Ontario.

A serious racial problem was now presented. The government, under the same regime, of two peoples as diverse in law and religion as the English Protestants and the French Catholics, was found to be impracticable, and led to the so-called Constitution Act of 1791. By this act of the British parliament, Canada was divided into two parts, that lying to the east of the Ottawa river to be known as "Lower Canada," and that to the west as "Upper Canada," each part to be under its own separate government.

In answer to the demands of the people, each colony now received a bi-cameral legislature, the upper house consisting of members appointed by the Crown, and the lower house of delegates chosen by the people. All legislative acts, however, were subject to the absolute veto of the colonial governor, who represented the Crown. It may be said in passing that a form of government similar to that just described, was also granted to the maritime provinces—New Brunswick, Nova Scotia, Cape Breton and Prince Edward Island.

But the most important change in the colonial government of Canada was the result of the rebellion of 1837. At this time Lord Dunham was sent to Canada to pacify the province and to suggest measures of reform. The exhaustive report (1839) which he made on this occasion has been called "the fountain head of all that England has since done for the betterment of government in the colonies." The most significant part of Lord Dunham's report was the recommendation of nothing less than complete self-government, with interference from England in nothing but questions directly affecting imperial interests.

As the outcome of this recommendation there was soon established in Canada, not only a representative legislature, but a responsible ministry. The governor and the upper house, or legislative council, were still to be appointed by the Crown, and the lower house, called the house of commons, to be elected by the people. But the chief organ of the administration, the "executive council," was to be chosen from the legislature. And so by the year 1847 the various provinces of Canada may be said to have acquired all the benefits of a responsible and autonomous government.

It is a noteworthy fact that the plan for the federation of these colonies came from the colonies themselves. At a conference held in Quebec in 1864, the separate colonies united in a memorial to the British parliament, requesting to be united under a single government. The result of this movement was the passage of the British North American Act in 1867, which organized the Dominion of Canada as a federal commonwealth. The original members of this federation were Nova Scotia, New Brunswick and Upper and Lower Canada—the latter colonies now receiving the names of Ontario and Quebec. The number of integral members has since been increased by the admission of British Columbia, Manitoba, Prince Edward Island, Saskatchewan and Alberta.

It has been asserted by Professor Dicey, an eminent English constitutional writer, that the constitution of Canada is modeled after that of the United States. This proposition has been disputed by other English writers. Such a dispute, however, seems hardly necessary, since it seems quite easy to see how far the federal union of Canada corresponds to the

federal union of the United States; and, on the other hand, how far the structure and working of the separate Canadian governments are based upon English precedents.

The American federal idea involves the distinct separation of the powers exercised by the central government and those exercised by the state governments, this separation being fixed by a sovereign power superior to that of either the central or state governments. This federal system is substantially reproduced in Canada. This is true, notwithstanding the fact that in the United States the constitutional law is established by the sovereign power of the people, while in Canada it is established by the sovereign power of the British parliament.

A marked distinction, however, is seen in the distribution of the delegated and residual powers. In the United States the delegated powers are granted to the central government and the residual powers are left to the states; while in Canada the converse is true, the delegated powers being conferred upon the provinces and the residual powers being left to the central government of the Dominion.

But granting that the federal union of Canada has a general analogy to that of the American federal union, it yet remains true that the structural organization and the practical working of the Canadian governments, both that of the Dominion and those of the provinces, follow the main lines of the English system—the distinctive features of this sytem being a nominal executive and a ministry responsible to the popular branch of the legislature. (*Cambridge Modern History*, Vol. XI, ch. 27, (2) "The Federation of Canada," by S. J. Reid.)

§ 3. Development of the Commonwealth of Australia

The growth of self-government and federation in Australia has taken place under conditions considerably different from those existing in Canada. In Australia the British policy has not been affected by the disturbance of a neighboring revolution like that of the American colonies; neither has it been complicated by a serious racial problem, like that which existed in Canada.

Although the coasts of Australia had been in early times touched by Spanish, Portuguese and Dutch voyagers, the English were successful in obtaining an exclusive foothold upon the island. The first use which England made of this territory was as a dumping ground for the dregs of her own population, establishing a colony of convicts on the eastern coast in the vicinity of Botany Bay. This penal colony was placed under the absolute rule of a military governor.

The opportunities afforded for extensive grazing and agriculture as well as mining, led gradually to the free migration of a large number of the English people. The new settlers refused to abandon their claim to the rights of English citizens. Consequently, the military administration was supplemented by the appointment of a civil governor and an advisory council, similar to the early change that had been made in Canada. This new administration in Australia exercised civil jurisdiction over the free settlers, and instituted trial by jury in civil actions.

The number of voluntary settlers continued to increase; and with their diffusion the territory became divided into several administrative areas, which had

something of the character of separate colonies. The absence of an elective element in the government was the cause of dissatisfaction among the new colonists; and the example of Canada was cited as justifying the demand for representative assemblies.

In response to this popular demand, Earl Derby in 1842 caused to be created in New South Wales a legislative body, composed of six public officials, six appointed members, and twenty-four elected delegates. But this measure was merely preparatory to the more important parliamentary act of 1850, which recognized the practical independence of the Australian communities. By this act permission was given to the colonists of New South Wales, Victoria, South Australia, and Tasmania to form their own constitutions, and submit them to Parliament for approval. Each colony voted for a bi-cameral legislature—in New South Wales and South Australia the upper house to be appointive and the lower house to be elective, while in Victoria and Tasmania both houses were to be elected by the people.

These constitutions received the royal assent in 1855, and the next year saw the meeting of the first colonial parliaments. The colonial governors soon became the nominal representatives of the Crown; and the real executive authority, after the British precedent, was assumed by the colonial cabinets, whose tenure of office depended upon the will of the legislature. Provisions similar to those just described were afterward granted to Queensland and Western Australia, so that all the separate Australian colonies obtained the benefits of an autonomous and responsible government.

It is a noteworthy fact that, in the case of Aus-

tralia as in that of Canada, the first impulse toward freer government came from the demands of the people themselves, resulting in discussions, more or less prolonged, in rational and diplomatic concessions on the part of the British parliament.

Notwithstanding their immense territory and their varied interests, the people of Australia soon saw the need of a closer union and of some common authority to supervise intercolonial relations and to provide for their common welfare. Various suggestions and experiments had been made in this direction since 1868; but the first decisive step toward a real federation of the colonies was taken in 1891.

It was then that a national conference was held at Sidney, called for the purpose of formulating some method of establishing a united commonwealth. This conference recommended that there should be created for the whole of Australia a central government, having a federal executive consisting of a governor-general and a responsible ministry, and a federal legislature consisting of two houses—a senate in which each colony should have equal representation, and an assembly in which the apportionment of members should be based upon population. The plan proposed by this conference was submitted to a second convention, called to draft an organic law to be submitted to the colonies. The draft-constitution prepared by this body was ratified by the people in 1899; it was approved by the British parliament in 1900, and was proclaimed by the king on January 1, 1901.

The constitution of the Australian commonwealth may perhaps be regarded as a more perfect example of a federal system than that of the Dominion of Canada. In both cases the administrative branch of

the government consists of a nominal executive, the governor-general, appointed by the Crown, and a ministry, or cabinet, responsible to the legislature.

But the structure of the legislative branch in the two countries is quite distinct, inasmuch as the members of the upper house in Canada, called the legislative council, are appointed by the Governor-general for life; while in Australia, the upper house, called the Senate, is composed of an equal number of delegates elected by the several colonies for the term of six years. In the distribution of governmental powers the Australian constitution follows the American system and not that of Canada,—the delegated powers being granted to the central government, while the reserved powers, not thus specially delegated, are left to the several states.

Moreover, in Australia there is established a supreme Federal Court, like that of the United States, having jurisdiction in questions relating to the constitutional powers of the Commonwealth. A noteworthy feature of the Australian law is the provision intended to prevent the obstruction of legislation by a "deadlock" between the two houses. In case the senate, for a second time, refuses to approve a proposed law submitted by the lower house, the governor-general is empowered to call a joint session of the two houses, at which the proposed law is passed, if approved by an absolute majority of the total numbers of members of both houses. (*Cambridge Modern History,* Vol. XI, ch. 27, (4) "The Development of Australia," by J. D. Rogers.)

§ 4. The Dutch and English Occupation of South Africa

The establishment of self-government in the colonies of Canada and Australia and the union of these colonies under well-organized federal systems, are the most conspicuous examples of the improved colonial policy of Great Britain. These results have been accomplished by the gradual recognition of the just demands of the subject population; and while often delayed by serious controversies, they have been attained for the most part without an appeal to arms.

But when we turn to the British policy in South Africa we have before us a darker picture. It has been said that the transition from Canada and Australia to South Africa is a "transition from regions of peace to those of war." In the former cases, progress has been made through paths of rational diplomacy and comparative tranquillity; in the latter case political liberty has been achieved only through fields of sanguinary conflict. We see here examples of that arbitrary commercial spirit which marked the British colonial policy of the seventeenth and eighteenth centuries. We see here the persistent oppression of a subject population by a ruling class. We also see here destructive wars carried on for the appropriation of lands belonging to other peoples. And worst of all we see here the destruction of two independent nationalities at the point of the sword. It may be claimed by the partisans of this policy that such a course of severe discipline has been necessary to bring the people of South Africa into that state of prosperity and freedom which they have finally reached.

The first problem which was presented to the

English government when it took possession of Cape Colony was similar to that which it was called upon to solve with the conquest of Canada—that is, to rule a body of foreign subjects.

The Cape had already been in the possession of the Dutch for more than one hundred and fifty years, when the English fleet in 1806 captured the territory as affording a convenient way-station on the route to India, and obtained a legal title to it in 1815. At this time the white population consisted of about 20,000 Dutch farmers, with an admixture of Huguenots who had fled from France after the revocation of the Edict of Nantes. This simple people had made little progress in industry; their life had been a barely successful struggle against poverty and the savage attacks of Kaffirs and Hottentots.

After many efforts the British government succeeded in 1820 in inducing a body of 4,000 English colonists to settle in South Africa; but on account of their prejudice against the Dutch, they were permitted to locate in a separate district east of Boer settlement at Cape Town. The two opposing colonies now presented a condition somewhat similar to that of the early French and English settlements in Canada. But the conciliatory policy which had been adopted with reference to the conquered French colonies in Canada was not applied to the conquered Dutch colonists in South Africa.

With little regard for the convenience or rights of the Dutch people, which formed by far the largest part of the population, the English language was made the sole official language of the whole colony. Besides this, the interests of British commerce seemed to require a change in the value of the existing currency;

and the value of the Dutch paper dollar, which had been current in the colony as equivalent to four English shillings, was now reduced to the value of eighteen pence—this step being taken against the angry protests of all the Dutch people.

But the most serious grievances of the Boers against the English rule grew out of one of the great philanthropic movements of modern times, that is the abolition of the slave trade in 1807 and the abolition of the institution of slavery itself throughout the British dominions in 1834. It has been said that in this matter "England did the right thing in the most indiscreet way possible." The Boer farmers in 1834, no less than some American planters in 1860, looked upon slavery as a divine institution, and as involving the vested rights of property. But the chief objection that the Boers urged against the abolition policy was not so much the loss of their slaves as the forfeiture of their property rights. The English government seemed willing to assume the moral duty, but not the financial burdens of emancipation.

That the government might not be exposed to the serious charge of confiscation, it was decided to pay to the owners about one-half of the value of their slave property, as estimated by government officials —with the provision that this compensation should not be paid in money, but in government stocks.

That the English government, however, did not free itself entirely from the charge of confiscation is evident from the provision of the law that every person who claimed compensation must present himself in person at the Colonial Office in London with documentary proofs of his right of ownership—a thing practically to throw upon a poverty-stricken people the

farmer to make a long journey to London to prove a claim to his property, was evidently impracticable. For him to furnish written documents that he was the legal owner of every slave in his possession, was evidently impossible. The effect of these provisions was practically to throw upon a poverty-stricken people the entire financial burden of a philanthropic act of which Great Britain expected to receive the sole credit.

§ 5. The "Great Trek" and the New Boer Republics

As the Boers had not the strength to resist these laws, their only alternative was to flee from them, Before the emigrants left Cape Colony they issued a statement which may well be called their Declaration of Independence, containing among their list of grievances these words: "We despair of saving the colony from the evils which threaten it. . . . We complain of the severe loss by the emancipation of our slaves, and the vexatious laws which have been made respecting them. . . . We are resolved that wherever we go we shall uphold the just principles of liberty; but whilst we take care that no one is brought by us into the condition of slavery, we shall establish such regulations as may suppress crime and preserve the proper relations between master and servant. . . . We quit this colony under the full assurance that the English government has nothing more to require of us, and will allow us to govern ourselves without its interference in the future."

At this time the administration of South Africa was in the hands of Sir Benjamin D'Urban, one of the most able of English officials, who was not in entire

sympathy with the summary methods adopted by the British government. His testimony as to the character of the Boers, at the time of the great exodus, is worthy of notice. He expressed his conviction that the Dutch farmers who were leaving the colony were "a brave, patient, industrious, orderly and religious people,—the cultivators, the defenders and the tax-contributors of the country."

The attitude of the British government toward the Boers after their exodus from Cape Colony may be indicated in a few words. The "Great Trek" began in 1836. The fugitives first moved north across the Orange River, then east to Natal on the eastern coast of South Africa. This country was supposed to be beyond the English jurisdiction. Here they established a government of their own, with a president and *volksraad,* or general assembly, and in 1839 proclaimed the "Republic of Natalia."

But the peaceful possession of Natal did not continue. Besides being compelled to resist the bloody assaults of the Zulu tribes, they were also obliged to submit again to the aggressive policy of the British government. Acting on the theory that the Boers were still British subjects and finding the country profitable for English settlers, the government in 1843 declared Natal to be a British province and annexed it to Cape Colony.

With the failure of this first attempt to found an independent state, the Boers moved inland and formed new settlements in the territory between the Orange river and its principle tributary, the Vaal—a land to which the English government had as yet made no claim. Here again they set up a government of their own, consisting of a president elected for four years,

and an assembly of representatives chosen by the people, and called their new republic the "Orange Free State." Here they hoped and prayed for peace.

But they were again doomed to disappointment. Under the pretext of protecting certain native tribes from the encroachment of the Boers, the British invaded their new home with a body of troops and proclaimed the sovereignty of England over the whole territory between the Orange River and the Vaal.

The Boers resisted by force of arms; but they were compelled to submit, and in 1848 their new country was annexed to Cape Colony. Many of the Boers in despair remained under the British rule; but a number of them, under their leader, Pretorius, moved to the north across the Vaal river to what became known as the Transvaal territory. Here they again formed themselves into a new state under the name of the "South African Republic," with the same form of government that they had been compelled to give up in Natal and the Orange territory.

The assumption of sovereignty over the previous territories of Natal and the Orange river country had brought the English into bloody and expensive conflicts with the native tribes—the Zulus, the Basutos and the more savage Kaffirs. It now seemed the part of prudence for the British government to abandon the Boers of Transvaal to their own fate and leave them to carry on their own struggle for existence. Consequently, instead of assuming sovereignty over this new territory, the independence of the South African Republic was formally acknowledged in 1852 by what is known as the "Sand River Convention." The Boers of Transvaal always relied upon this convention as guaranteeing them their full

independence from British interference. Its exact terms, therefore, are of some importance. They read as follows: "The Assistant Commissioners guarantee, in the fullest manner, on the part of the British government, to the emigrant farmers beyond the Vaal river, the right to manage their own affairs and to govern themselves without any interference on the part of her Majesty, the Queen's government, and that no encroachment shall be made by said government on the territory beyond to the north of the Vaal river." Motives somewhat similar to those which led the British government to acknowledge the independence of the Boer republic north of the Vaal soon led to the abandonment of sovereignty over the people south of the Vaal; and in 1854 the Orange Free State was also recognized by Great Britain as a free and independent republic.

By the steps thus briefly outlined, there came into existence the four political communities in South Africa, namely the two British colonies of Cape Colony and Natal, and the two independent Boer republics, the South African Republic (the so-called Transvaal) and the Orange Free State.

§ 6. The Boer War and the Changed Policy of England

To one who looks at the subsequent history of these political communities there is presented a striking and almost appalling contrast between the gradual enfranchisement of the two British colonies and the gradual destruction of the two Boer republics. Reforms quite similar to those we have already traced in the colonies of Canada and Australia took place in the governments

of Cape Colony and Natal. About the time of the removal of the Boers from Cape Colony, the military rule which had existed in this colony for thirty years was replaced by a civil governor, assisted by executive and legislative councils.

Since these councils were appointed by the Crown, the colonists themselves had as yet no share in the government; and the authorities at London were not disposed at first to grant them such a share. In 1841 a petition for a representative assembly was sent to the Colonial Office, but it received no attention. In 1849 the British cabinet decided to substitute Cape Colony for Australia as a penal settlement; but the people of the Cape rose in arms, and refused to permit the landing of convicts on their shores.

This incident aroused the people to make new demands for self-government; and in 1850 a bi-cameral legislature was established, both houses being elected by the people. This gave to the people a representative legislature, but the executive was still irresponsible, being appointed by the Crown and having an absolute veto upon all laws. It was not until 1874 that the people obtained a responsible ministry—which privilege, however, they in fact purchased from the English government by agreeing to maintain at their own expense the British fortifications at the Cape. In Natal similar political changes took place, although it was not until 1893 that representative and responsible government was finally established in this colony.

Thus we see in the two British colonies in South Africa, as in Canada and Australia, the gradual development of a reformed system of colonial administration. Moreover, the stages in the development of this system had been quite similar in these different

areas. These stages may be indicated in general as follows: First, the government of the colony by military rule; next, the appointment of a civil governor, assisted by an appointive council; afterward, the establishment of a representative assembly, subject to the absolute veto of the crown officials; and, finally, the granting of a responsible ministry, amenable to the lower house of the legislature, thus assuring to the colonists all the rights of Englishmen. (*Cambridge Modern History,* Vol. XI, ch. 27 (3), "The English and Dutch in South Africa" by A. R. Colquhoun.)

If we now turn to the relations of Great Britain to the Boer republics, we find that an entirely different policy was pursued; and we find that it was the Transvaal people, or the South African Republic, which bore the chief brunt of this oppressive regime. We cannot consider in detail the bitter controversies and open hostilities which marked the period extending from 1877 to 1902, but there are certain facts of this painful period which cannot well be forgotten, and may be summarized as follows:

(1) The unwarranted assumption of British sovereignty over the South African Republic in 1877 (the independence of which had previously been acknowledged in the San River convention in 1852)—this assumption being followed by the armed resistance of the Boers, in their first war, which culminated in the English disaster at Majuba Hill in 1881.

(2) The convention at Pretoria in 1881 and the convention at London in 1884. The former convention, which closed the first Boer war, granted complete self-government to the Transvaal people subject to the "suzerainty" of the Queen. The latter convention

omitted the "suzerainty clause" and provided that England should abandon all claim to control the internal affairs of the republic, reserving only the right of veto over all foreign treaties made by the Republic, except those made with the Orange Free State.

(3) The discovery of gold in the Transvaal after 1884, and the influx of "outlanders" who threatened to outnumber the Boers and get control of their government—which fact led to long and heated controversies regarding naturalization and taxation.

(4) The notorious Jameson raid of 1895, intended to foment insurrection against the Boer government.

(5) The failure of the contending parties to come to any agreement at the Conference at Bloemfontein in 1899, followed by the mobilization of British troops in South Africa and on the Boer frontiers, and by the ultimatum sent by President Kruger to the Queen demanding the withdrawal of the British troops, which demand was regarded by the British ministry as justifying a declaration of war.

(6) The second Boer war from 1899 to 1902, in which the Orange Free State joined the cause of its neighbor, the Transvaal people, and which was closed in the reduction of the two Boer republics to the condition of British provinces, and the signing of the Treaty of Vereeniging on May 31, 1902.

What policy should now be adopted by Great Britain with reference to these, her new subject colonies, was a serious and difficult question. It was stipulated in the treaty of peace that military administration in the Transvaal and the Orange River colony should cease at the earliest possible date, to be succeeded by civil government. As to how and when this should

or could be accomplished, there was a wide difference of opinion in the British parliament.

The conservative party, under whose administration the war had been conducted, argued: (1) that self-government could not be granted to the conquered provinces without an assurance of British supremacy; (2) that this could not be obtained except by an increase of the British population in the territory; (3) that there was no inducement for English settlers unless the economic conditions were greatly improved, especially by the revival of the mining industry now stagnant on account of the war; and (4) that on account of the practical impossibility of obtaining the requisite number of white and native laborers, it would be necessary to resort to the importation of Chinese coolies,—in other words, that the importation of Chinese labor was a necessary condition of granting free government to the Transvaal and Orange River colonies. As the result of this elaborate piece of sophistry about 50,000 Chinese coolies were introduced into South Africa in 1904.

This whole policy met with violent opposition by the liberal party, which held that the only way to secure British supremacy was to obtain the loyalty of British subjects. This was one of the important issues which brought into power the liberal administration of Campbell-Bannerman in 1906.

Then it was that the British government first adopted a rational and generous policy, which partly atoned for years of mismanagement and injustice. If this ministry had done nothing else to its credit, it would be entitled to everlasting gratitude for respecting the highest moral judgment of the English nation and the conscience of mankind, by totally reversing

the traditional policy of Great Britain in its treatment of the Boers in South Africa.

In 1906 Chinese coolie labor was abolished and provisions were made for the return of all Chinese to their native country. It was announced in the English House of Commons that the last Chinaman was due to leave South Africa on January 1, 1910.

But more than all this and as a fitting consummation of the new liberal policy, the conquered people of the Transvaal and Orange River colonies received in 1907 the constitutional grant of a popular government with a responsible ministry—which placed them at last upon a plane of equality with the other South African colonies and with the colonies of Canada and Australia. As a result of this humane treatment the racial animosities have gradually disappeared and the Boers have become among the most contented and loyal of British subjects.

§ 7. The Union of the South African Colonies

The only thing that now seemed necessary to ensure the prosperity of South Africa was the closer union of the four colonies under some common system of government. The idea of "federation" was the means first proposed to effect this union. As early as 1857 Sir George Grey, the governor of Cape Colony, had suggested that by a federal union only could the South African colonies maintain themselves against the native tribes. Later, in 1876, the British ministry, becoming convinced of the success of the Canadian federation, tried to establish an African federation on a similar plan; but this plan did not meet with the approval of Cape Colony. It

was evident that a plan of union to be satisfactory and successful must come from the colonies themselves. Accordingly the British parliament passed an act enabling the South African governments to unite in a confederation whenever they might see fit.

The chief causes which finally led to the union were of an economic character. The discovery of diamonds and gold in the eighties led to a heated rivalry between the different railroads for the control of the traffic of the mining districts. These railroads were owned by the separate colonies; hence the commercial rivalry led to colonial jealousies. At first, Cape Colony, by uniting her lines with those of the Orange Free State, controlled the situation. To counteract this advantage, the Transvaal made an arrangement with the Portuguese colony on the coast, by which an all-rail route was established to Delagoa Bay, the nearest seaport to the mining districts. This shifted the advantage from Cape Colony to the Transvaal line.

Another cause of discontent was the imposing of custom duties by the coast colonies—the Cape and Natal—which duties rested as a burden upon the inland colonies—the Orange Free State and the Transvaal. These differences led to many inter-colonial conferences and to partial custom-unions. But such expedients never proved satisfactory, for whatever arrangements were thus made had to be ratified by each of the four legislatures before they could become effective.

Such was the general condition when in May, 1908, a conference of the several governments was held at Pretoria to amend the various and conflicting customs and railway rates. This conference was unable to

agree upon any satisfactory changes, but took a practical step towards union by adopting the following resolution: "In the opinion of this conference the best interests and permanent prosperity of South Africa can only be secured by an early union of the self-governing colonies, under the crown of Great Britain." This resolution was immediately approved by each colonial parliament, and delegates were appointed to draft a constitution for the common government.

The delegates met at Durban in Natal in October, 1908, and closed its sessions at Cape Town in February, 1909. The fact that all the members of this conference were impressed with the transcendent importance of the end to be reached, is evident from the great harmony which marked their deliberations and the spirit of compromise that prevailed. Even the difficult problem as to the location of the capital of the new government was solved by establishing two capital centers,—the executive center being fixed at Pretoria, in Transvaal, and the place for the meeting of the legislature at Cape Town. All differences relating to custom duties were healed by the adoption of free-trade within the Union. The vexed question relating to the official language was settled by making the Dutch and the English alike official languages, all public documents to be published in both.

This draft constitution was submitted to the colonies; and as the result of criticisms and suggestions, a second national convention was called in May, 1909, at Bloemfontein in the Orange River colony, to redraft the constitution. This second draft was submitted to the several governments and within a month was adopted by all the colonies. The draft was then laid before the British parliament in July, and under

the name of the "South Africa Act," was passed by both houses without amendments (1909). Although strong objections were made to certain features of the act, it was deemed hazardous for Parliament to make any changes which might not be acceptable to the colonists and thus wreck the whole union scheme.

§ 8. The Constitution of the South African Union

In considering the nature of the union effected by the South Africa Act of 1909, the most distinctive and remarkable feature that impresses one is the fact that it does not follow the lines adopted in the Canadian and Australia federations. It does not establish a federal commonwealth, but a unitary government. The political autonomy hitherto exercised by the several African colonies is given up, and all legislative power is transferred to the central authority. This seems the more remarkable when we consider the desperate efforts previously made by the Boer republics to secure their own independence.

The Boers are now among the most loyal supporters of the South African Union, although their respective territories have scarcely more independence than that of local administrative districts. This can be explained only by the fact that they have become convinced that their interests are identical with those of the other South African people; and while subject to a common Colonial parliament, they will be relieved from the dictation of the Imperial government at London.

The common government of the South African Union, which was put into operation on May 31st, 1910, is, under the supremacy of the British Crown, constituted as follows:

(1) The executive branch consists of a Governor-general who represents the Crown, assisted by an executive council, appointed by the governor-general, as an advisory body; and a ministry of not more than ten persons having charge of the various departments of state, appointed by the governor-general, and holding that office theoretically during his pleasure, but practically as long as they receive the support of the legislature.

(2) The legislative branch, called the Parliament, consists of a Senate and a House of Assembly. The Senate is composed of eight senators nominated by the governor-general and eight chosen by each of the four colonies—all senators being nominated or chosen for a term of ten years. The House of Assembly is composed of 121 representatives, apportioned according to the population, and elected for a term of five years. In case of a deadlock between the two houses, provision is made for the calling of a joint session of both houses.

(3) The judicial branch consists of a Supreme court, divided into two branches, namely, the Appellate division of the Supreme court having jurisdiction throughout the South African Union; and what are called provincial divisions of the Supreme court, which are the continuations of the previous colonial Supreme courts, having jurisdiction within their respective provinces.

(4) In respect to the local government, we find the greatest departure from the federal systems of Canada and Australia. In South Africa the previous colonial governors and legislatures are superseded by an entirely new local system. In place of the colonial governor is an executive officer called the "administrator

of the province," who is appointed by the governor-general in council for a term of five years, and who acts as the administrative agent of the central government. In place of the previous colonial assemblies with their two houses, is now established in each province a single provincial council, the members of which are elected by the qualified voters of the province, but the powers of which are restricted to the passing of ordinances upon certain specified matters, subject to the approval of the governor-general in council. By these provisions the local governments become subordinate parts of the centralized government of the union. (For the text of the British North America Act, 1867; of the Australia Constitution Act, 1900; and of the South Africa Act, 1909; see *Supplement to the American Journal of International Law,* January, 1910.)

The main difficulty which presented itself in the adoption of the new constitution was due not to its non-federal features; but rather with the provisions of the law relating to the color question and the electoral franchise. In one province, Cape Colony, there was no color line. The white man and the black man enjoyed the same political rights. In all the other provinces, namely, the Orange River Colony, the Transvaal and Natal, the color line was strictly drawn. In the constitution of the Union, it was provided that no person could be a member of parliament who was not a British subject of European descent. By acceding to this provision Cape Colony yielded her claims to those of the other colonies.

When, however, it came to making a uniform law relating to the qualifications of those who might vote for members of Parliament, the case presented greater

difficulties. If Cape Colony should now yield to the prejudices of the other colonies, she would be obliged to disfranchise a part of her own population—which she refused to do. If, on the other hand, the other colonies should yield to the Cape, they would be compelled to abandon the color line—which they also refused to do.

This political difficulty could only be settled by a compromise. It was hence provided that the qualifications for the parliamentary franchise should be prescribed by the Parliament itself, on the condition that no person then possessing the colonial franchise in Cape Colony should be disqualified, except by a two-thirds majority of the total number of the members of both houses sitting in joint session. This example illustrates the patience and skill exercised by the makers of the new constitution in overcoming what seemed to be insuperable obstacles.

The union of British South Africa under a single government was looked upon by English statesmen as an achievement of the greatest importance, and as the solution of what was long regarded as a "political riddle." Lord Crewe said that it is "a measure which closes one chapter in the history of South Africa and begins a new one." Mr. Balfour enthusiastically called it "the most wonderful issue out of all those divisions, controversies, battles and outbreaks—the horrors of war, the devastations of peace. I do not believe," he exclaims, "the world shows anything like it in its whole history." This may be extravagant praise, but it shows the British appreciation of this work of political art. When the proposed constitution, with its nice adjustment of compromises, was laid before the British parliament, a few liberals were bold

enough to suggest some criticisms upon its color scheme, but no one ventured to touch it with his ruthless hand, lest it might fall into fragments and the magic creation disappear.

The great significance of the South African Union consists in the fact that it is a new evidence of the growing diplomatic wisdom which the British government has shown in respect to the political rights and claims of its subjects; moreover, that it is a constitution made practically by the people themselves, who have thus proved their capacity to exercise political powers; and, finally, that it affords a new bond of union between the different part of the British empire, and constitutes a new guarantee of British loyalty.

CHAPTER IX

THE GROWTH OF THE CONCERT OF EUROPE: THE INTERNATIONAL POLICY OF INTERVENTION

There is no lover of the human race who does not deplore the fact of war. While the patriotic instinct inspires us to support our country in defense of its rights and in upholding its honor, no humane person can repress the feeling of pain and distress when he realizes that the world has advanced so little in civilization as not to be able to find some way to settle international disputes without the shedding of blood.

But in spite of this dissatisfaction, we must confess that, as things now are, rights when they are assailed can be maintained, as a last resort, only by some form of force. It also seems evident that as long as states are isolated and independent of one another, the exercise of force on the part of one against the resistance presented by another, is apt to be uncertain in its results and wasteful of human life. Isolation is weakness. It then becomes a pertinent question whether by a combination of states there may not be developed a united force sufficiently formidable to destroy the hope of resistance, and thus to promote the enforcement of international justice. This question has been made the subject of discussion by philosophical thinkers, by practical statesmen and eminent

diplomatists. Its solution has been sought through the negotiation of treaties and the deliberation of world congresses. The latest attempt to meet this problem is seen in the present "League of Nations."

Whether the present attempt to guide the destinies of the world by the co-operative efforts of its constituent states will be ultimately successful—although an object "devoutly to be wished"—is a matter which the future alone can disclose. But we cannot shut our eyes to the fact that this laudable project, which now appeals to the attention and hopes of mankind, has doubtless before it many causes of anxiety, and possible pitfalls which must be removed or surmounted. The lower instincts of human nature, the influence of race prejudice, the lure of political ambition, the spirit of commercial rivalry, are, it must be admitted, fundamental obstacles to international co-operation. The past history of Europe may furnish us with examples as to how far a general peace may be promoted by associations and alliances, and how far the attending dangers and obstacles may prove to be hindrances to international tranquillity.

If any previous European conflict can be compared with the terrific carnage and devastation that marked the recent struggle from 1914 to 1918, it would probably be found in the horrors of the Thirty Years' War, which afflicted Europe from 1618 to 1648. which blighted the German Empire, desolated its many cities, reduced its population from 30,000,000 to 12,000,000, and retarded its civilization for nearly two hundred years. Such a war seemed to reduce to a practical absurdity the proposition that differences of opinion must be settled by an appeal to arms and human passion. So, at least, it seemed to Hugo

Grotius, the "father of international law," who became convinced that "Christian nations should be bound by the ties of Christian morality, and that their relations in time of war as well as in peace should be regulated by the law of reason and humanity."

§ 1. The Peace of Westphalia and the "Balance of Power"

The first really effective attempt to regulate the international relations of Europe in modern times by means of co-operative action was made by the Peace of Westphalia in 1648, which closed the Thirty Years' War. This war had been the result of the religious antagonisms engendered by the Reformation. It started as a struggle between the Protestant and Catholic princes of Germany, but it gradually involved nearly all the states of Europe.

At its close it became necessary to repair so far as possible the disasters it had wrought, to reconstruct the broken boundaries between the states, and to reconcile the hostility between the opposing creeds. For these purposes an assembly was called to meet at the two Westphalian cities of Osnabrück and Munster, and the treaties formed by these two bodies are known as the Peace of Westphalia. This assemblage was made up not only of the disaffected princes of Germany, but also of the mediating powers of France, Sweden, Venice and the Pope. After four years of deliberation it succeeded in its main object by removing the chief difficulties which led to the previous disastrous war; but it also attempted to formulate the conditions of a permanent peace. It designated France and Sweden as guaranteeing powers with the right of intervention

for the purpose of upholding the terms of the Westphalian treaties. (A. W. Ward, "The Peace of Westphalia," in *Cambridge Modern History,* Vol. IV, ch. 14.)

It would be difficult to overestimate the importance of the Peace of Westphalia as a contribution to international law and diplomacy. In the first place, its chief purpose was to find some basis for the more general pacification of Europe. Although it did not put a stop to European wars, it no doubt tended to discourage the carnage and devastation that marked the horrors of the previous conflict; and it paved the way and furnished the basis of future treaties of peace. In the next place, it was the first diplomatic emphasis given to the need of concerted action and co-operation in international affairs. By the united efforts of different powers there were fulfilled the practical conditions of a European concert. Here was a recognized combination of certain states bound together by a common policy, which was formulated in treaty stipulations and furnished with a certain guarantee for their execution.

Moreover, this Westphalian assembly was the beginning and prototype of a remarkable series of similar diplomatic assemblies, which, to a certain extent, tended to promote the peace of Europe. The Congress of Nimeguen in 1678 closed the war of Louis XIV with the Spanish Netherlands, and compelled that monarch to give up many of his unjust conquests. The Congress of Ryswick in 1697 terminated the long struggle of that same ambitious monarch against the "Grand Alliance," and resulted in restoring the broken lines of Europe. The Congress of Utrecht in 1713 —which like the previous ones resulted in a number

of separate treaties—closed the War of the Spanish Succession, and establish a peace which lasted for more than twenty years. Each of these congresses confirmed the work of its predecessors, so that it has been said, "their labors formed a continued series and identical body of international legislation."

But perhaps the most noticeable feature of the Peace of Westphalia was that which involved the famous theory of the "balance of power." Such a theory of equilibrium was no doubt tacitly assumed in the political combinations of the ancient Greek cities, and those of the Italian cities in the middle ages, and also later in efforts to withstand the ambitious pretensions of Spain and the House of Austria. But it was not until the Peace of Westphalia that this theory came to exercise a preponderating influence upon the minds of European statesmen. For nearly two hundred years after that memorable Peace this idea of an international equilibrium formed a conspicuous feature in the diplomacy of nations. The essential idea of the balance of power did not involve the attempt to equalize the power of different states, but simply the right of combination on the part of the weaker powers to insure their stability against the dangerous aggrandizement or unjust encroachment on the part of a greater power. It was based upon the assumption that Europe formed one grand commonwealth, bound together by moral ties and cemented by positive treaties and conventions to protect the weak against the strong. (Hume's Essay on the "Balance of Power"; Eugéne Ortolan, "Balance of Power," in *Lalor's Cyclopaedia of Political Science.*)

In a time that was especially marked by dynastic ambitions it may be said that the theory of the balance

of power represented the highest moral sense of Christendom. Its just and humane purpose was often expressed in the words of contemporary writers. "Christendom," wrote Fenelon to the Duke of Burgundy, "is a kind of universal republic which has its interests, its fears, and its precautions to be taken. All the members of this great body owe it to one another for the common good, and owe it to themselves for the security of their own country, to prevent the aggrandizement of any other members who seek to destroy this balance." The great publicist, Vattel, understood it to mean, "such a disposition of things that no one potentate or state shall be able absolutely to predominate, and to prescribe the laws to the others; that all are alike interested in maintaining this common settlement, and it is the interest, the right and the duty of every power to intervene, even by force of arms, when the conditions of this settlement are infringed or assailed by any other member of the community." The Chevalier von Gentz, one of the ablest and most distinguished of its defenders, defined the balance of power to mean, "an arrangement subsisting between neighboring states, more or less connected with one another, by virtue of which no one among them can injure the independence or essential rights of another without meeting with an effective resistance, and so exposing itself to danger."

From Westphalia to Utrecht the recognition of this principle was especially evident in the combinations and alliances formed by various powers against the successive encroachments and wars of conquest undertaken by Louis XIV. After the Peace of Utrecht similar combinations were formed, for example, against the rising power of Frederick the Great, in

the Seven Years' War, which was closed by the Peace of Paris in 1763—against the maritime pretensions of England which resulted in the "Armed Neutrality" of 1780—and still later, against the ambitious policy and conquests of the First Napoleon, culminating in the reconstruction of Europe at the Congress of Vienna in 1815.

The question may arise as to the justice involved in this theory of the balance of power. The leading publicists of Europe—assuming as the governing principle of international law, the absolute independence and sovereignty of nations—have hesitated to admit this theory as a part of the positive law of nations, but are inclined to accept it as a principle of morality and justice. Grotius, while denying that it is proper to restrain the legitimate growth and expansion of another power, treats the right of self-defense as a just cause of war, and hence would justify the combination of weaker states against the unjust aggression of a more powerful neighbor, as a means of self-protection. Pufendorf thinks that mere fear caused by the expansion of a neighboring state is not a legitimate reason for war, unless there is a moral certainty of evil designs against other powers. Vattel condemns the idea of international equilibrium as a means of equalizing the power of different states, which he regards as practically impossible; but he regards the principle as furnishing a proper remedy against unjust and actual aggression. The distinguished American publicist, Henry Wheaton, sees no limit to the right of a state to aggrandize itself by all innocent and legitimate means; but when the aggrandizement must cause direct injury to other states it ceases to be justifiable. Thus, while there may be

a doubt whether or not the theory has been incorporated into positive law, there is no doubt that it is recognized as a just principle of international policy.

The benefits which may be accredited to this principle may be seen by a review of some of its results. Although it did not prevent war, it has evidently justified only wars of defense, and not wars of aggression and conquest. Moreover, the combinations and alliances which it has inspired and the treaty stipulations made under its influence, have tended to preserve the custom of concerted action and the spirit of co-operation which was first formally recognized by the Peace of Westphalia. It is true that the various diplomatic assemblies which met during this period were not made up of a single and permanent body of representatives; but they were yet influenced, to a great extent, by a common consensus of opinion which guided their deliberations and affected their discussions;—and this general consensus of opinion may be looked upon as forming the basis of the "old concert of Europe."

The chief defect of the theory of international equilibrium was—besides its possible perversion in the futile attempt to equalize the power of different nations,—the fact that it sought to accomplish the equally futile purpose, namely, to stabilize the territorial limits of the different states of Europe. The rise of new states and the colonial expansion of the existing states, rendered it practically impossible to fix a *status quo* which could be permanent. The growth as well as the decline of nations is inevitable. It is impossible for the wisest of men to forecast the future. Of international life it may be said, as of all life, that while "it is true in transition, it becomes false if fixed."

§ 2. The Congress of Vienna and the Concert of Europe

Since the Peace of Westphalia there has probably been no diplomatic assemblage of greater importance than that which met in 1814 and finished its labors in 1815, and is known as the Congress of Vienna. This congress had for its primary purpose the recovery of Europe following the destructive wars of Napoleon. It also sought, like its predecessors, to frame the basis of a permanent peace. Its distinctive character, however, is seen in the new method adopted to secure this peace. While the previous assemblies had recognized the right of the *weaker* powers to combine in order to resist the aggression of the greater powers, the new Congress recognized the right of the *greater* powers to combine in order to control the affairs of the weaker powers.

How the great monarchical powers came to assume the combined authority in European affairs will appear when one considers the international situation between the years 1789 and 1815. The two great outstanding events and most disturbing factors of this period had their origin in France,—namely, the spread of democratic ideas due to the French Revolution, and the threatened dismemberment of the international system due to the extension of the French Empire under Napoleon.

In their intense hatred of the "ancient regime," with its aristocratic and monarchical system, the French people sought for deliverance in the principles of democracy. They found their slogan in the words, "Liberty, Equality and Fraternity." They found their justification in the French philosophy of the eighteenth

century. They directed their attacks, not only against their own monarchy, but against all the monarchies of Europe. By the execution of their own king, Louis XVI, in 1793 they aroused the active hostility of the neighboring states. This hostility was not diminished, but rather intensified by the ambitious policy of the First Napoleon. The positive encroachments upon the existing European system led to the alliance of the leading powers—England, Russia, Austria and Prussia —not only for the overthrow of the aggressor, but for the reconstruction of the territorial map of Europe,

The Congress of Vienna was therefore called by these Allied powers, which assumed control over all its deliberations. The Congress was, it is true, made up of the representatives of nearly all of the continental states. It exceeded in magnificence and display all previous assemblies. In its social functions it excited the admiration of all its participants, but in its political and diplomatic functions it was confined to the leading powers. Indeed, judging from its proceedings, it can hardly be called a "congress" in the ordinary sense. There was no formal exchange of credentials, nor any formal opening of the body. There were no general sessions of all the representatives. There were, it is true, many treaties formed between various states in the so-called "committees," but all these arrangements were subject to the approval of the Great Powers. The general principle adopted by the Congress, so far as any such principle is evident, was professedly that of "legitimacy"—that is, the restoration to the various states of the possessions they had held before the Revolution of 1789. But this principle was by no means strictly adhered to, especially on the part of the chief powers, who often

despoiled the weaker states for their own benefit. And even among the chief powers themselves there seemed to be no common motive, except that of self-interest. To one who reads the proceedings of this body of diplomats, it appears like a general scramble for territorial possessions, animated by the spirit of intrigue and resulting in bickering compromises. In the words of a distinguished observer, the chief aim of the Congress "was to divide among the conquerors the spoils taken from the vanquished." (See Gentz, "On the Vienna Congress," in the *Memoirs of Metternich,* Vol. I, pp. 253–286.)

The long peace which followed this Congress was due more to the general exhaustion resulting from the Napoleonic wars than to any provisions of the Congress itself. Without attempting to trace the resulting boundary lines between the different European states, it is more revelant to our present purpose to indicate how the chief powers of the Congress of Vienna became the Great Powers of the new "Concert of Europe." The Congress of Vienna concluded its labors in what is known as the "Final Act of June 9, 1815." Subsequent to this "Final Act" there were formed between the chief allied powers two supplementary agreements, which were of great significance in the future history of Europe. The more famous and less important of these agreements was the so-called "Holy Alliance." It was formed (September 26, 1815) at the pious suggestion of the Tsar Alexander I, between Russia, Austria and Prussia, to which other powers were invited to join. This so-called Alliance was scarcely more than a passive concurrence, on the part of its members, with the idealistic scheme of the Tsar, in the statement of his personal opinion

that Europe should, henceforth, be governed in accordance with the principles of the Christian religion; that governments in their relations with one another should be guided by the precepts of that holy religion, the precepts of justice, charity and peace." Although it may have been prompted by the sincerest of motives, and, out of respect for the Tsar, it was signed by nearly all the powers of Europe, no one seemed to have any faith in its real efficacy except the Tsar himself. To practical diplomatists it seemed a mere expression of religious emotionalism. To Castlereagh, the British minister, it seemed "a piece of sublime mysticism"; to Metternich, the Austrian chancellor, "an overflow of pietistic feeling"; to Gentz, the Prussian publicist, "a bit of stage decoration."

But the more important and less famous of these two agreements was that signed (November 20, 1815) between Russia, Austria, Prussia and England, the four leading powers at the Congress of Vienna, and called the "Quadruple Alliance." This alliance, in fact, formed the real basis of the new Concert of Europe. It was directed to specific and practical ends—chiefly, to secure the maintenance of the European system as provided for by the late Congress; and incidentally, to prevent the spread of the so-called "French ideas," involving the suppression of the liberalizing and supposed dangerous tendencies which followed the French Revolution and the career of Napoleon. By a strange irony of history these two agreements have become confused and the new Concert has become generally known under the name of the Holy Alliance. (W. A. Phillips, *The Confederation of Europe,* IV, iii, "The Holy Alliance.")

Under the dominating influence and adroit diplo-

macy of Metternich, a general policy of intervention was adopted by the Allies for the purpose of interfering in the internal affairs of any country in which there might appear revolutionary tendencies in the direction of liberalism and constitutional government. One of the first applications of this policy was seen in the case of the so-called "Carlsbad Decrees," which were inspired by Metternich, and intended to repress the liberal movement showing itself in the universities of Germany. To further this policy a series of "congresses" was planned at which the Powers were expected to meet and confer on matters of common interest. At the Congress of Aix-la-Chapelle, (1818), France, which was evidently reconciled to the new system, was admitted as a member of the new "Concert." At the Congress of Troppau (1820), where the question of interfering in a popular revolution in the kingdom of Naples was discussed, Austria, Prussia and Russia acceded to the policy of intervention laid down by Metternich, while England refused to take an active part, and France remained passive. At the Congress of Laibach (1821) it was decided to repress the Neapolitan revolution with the aid of an Austrian army. Finally, at the Congress of Verona (1822) it was determined, after much discussion (with the concurrence of France and the opposition of England) to intervene in a popular revolt in Spain, and a French army was commissioned to carry out the policy of the Allies. (W. A. Phillips, "The Congresses," in *Cambridge Modern History*, Vol. X, ch. i.)

The disaffection of England tended to weaken the concerted action of the Allied powers. From this time we begin to see, on the part of the different members of the Concert, a disposition to assume diverging lines

of policy, namely: (1) the reactionary policy of Austria, Prussia and Russia, with the accession of France, under the leadership of Metternich; and (2) the liberal policy of England under the leadership of Canning, the new British minister. Metternich, by his skillful manipulations, had succeeded in putting down the popular insurrections in Naples, Piedmont and Spain, with the aid of the Austrian, Russian and French armies. It was suggested that similar policy of intervention should be adopted to subdue the revolution of the Spanish colonies in America. Under the influence of Canning, however, England assumed the position that "each nation is free to determine its own form of government," and the United States was encouraged to put a stop to the proposed intervention of the allied powers in the matter of the Spanish-American colonies, by the announcement of the Monroe Doctrine. W. A. Phillips, *The Confederation of Europe,* IV, vi; "The Genesis of the Monroe Doctrine"; F. A. Kirkpatrick, "The Establishment of Independence in Spanish America," in *Cambridge Modern History,* Vol. X. ch. 9.)

§ 3. The Eastern Question and the Problem of Intervention

The most important event which now began to distract the attention of Europe and to divert the policy of intervention as advocated by Metternich into a new channel, was the abrupt intrusion of the Eastern Question, brought into prominence by the Greek Revolution. There is a certain broad and perhaps philosophical sense in which the Eastern Question may be said to be one of the perennial problems of human history—a question extending from the Trojan war

to the recent Conference at Lausanne—a question which marks the irrepressible conflict between Orientalism and Occidentalism. The scholar from his high vantage ground may see in this question the perpetual ebbing and flowing of the tides of conquest between the East and the West, the action and reaction of Asiatic and European influences. However fascinating such a view may be to the philosophical student of history, it is in no such sense as this that the Eastern Question was now presented as a specific problem to the concerted powers of Europe.

This question, in fact, involved the very principle and purpose of the policy of intervention, as conceived by Metternich and his followers. The idea of the Austrian chancellor was that intervention should be used only for the purpose of quelling popular uprisings against monarchical power. The question was now forced upon Europe whether the policy of intervention might not be adopted to free a struggling people from the despotism of an Oriental sovereign. The Christian people of Greece were now in revolt against the oppression of the Turkish Sultan. Before this time there had been no concerted policy as to what should be done with the Turk in Europe. Back in the fourteenth century he had gained his first foothold upon European soil. In the fifteenth century he had captured Constantinople, and converted that city into the seat of his imperial government. In the sixteenth century he had conquered the whole of southeastern Europe, and extended his oppressive sway to the walls of Vienna. In the eighteenth century Austria and Russia, his nearest neighbors, had begun to pare off the outlying provinces of his empire and to lay plans for dividing between them his entire estate.

To Russia, locked up in her landed confines, the prospect of an egress to the Mediterranean sea was especially attractive. Since the days of Peter the Great and Catherine II, the goal of Russia's ambition had been to plant the Greek cross on the dome of Saint Sophia at Constantinople. But it was not until the beginning of the last century that the far reaching purpose of Russia was revealed. Then it was that Europe began to be interested in the serious problem which of two evils was the greater—the aggrandizement of Russia, or the continued presence of the Turk in Europe. Russia by her continued aggressions presented to the rest of Europe an avalanche of threatened dangers. Turkey by her cruel and oppressive government had become a scandal to the whole of Christendom.

Nearly all the complications connected with the Eastern Question during the nineteenth century may be referred to two simply but conflicting sentiments —the fear of Russia on the one hand, and a sympathy for the Christian subjects of Turkey on the other hand. Policy and humanity were thus the rival motives which tended to complicate the Eastern Question, and to distract the policy of the European Concert. To be politic and resist the aggressions of Russia would seem to require the maintenance of the Turkish empire as a European bulwark, which would evidently involve the continuance of Turkish oppression—and this would be *inhuman*. To be human and enfranchise the subjects of the Sultan by driving the Turk from Europe would open the way for Russia's aggrandizement—and this would be *impolitic*. One might insist on humanity at the expense of policy. Another might insist on policy at the expense of hu-

manity. But how to reconcile the dictates of humanity with the requirements of a safe policy—how to protect the subjects of Turkey, and at the same time resist the encroachments of Russia—was a problem difficult for diplomacy to solve. (Holland, *The European Concert in the Eastern Question,* ch. 2, "Greece"; W. A. Phillips, *The Confederation of Europe,* VII, iii, "The Eastern Question"; Fyffe, *Modern Europe,* ch. 15; "Greece and Eastern Affairs.")

§ 4. The European Concert and the Greek Revolution

The first decisive effort of the European powers during the nineteenth century to solve the Eastern question was prompted by the spirit of humanity. It was made in behalf of the Greeks who in 1821 began their struggle for independence. Goaded by the cruelty and oppression of the Turkish government, and inspired by the awakened sense of nationality, this people of classic memories appealed to the sympathies of the world. Byron regarded the Greek war as a "contest between barbarism and civilization, between Christianity and Islamism, a struggle in behalf of the descendants of those to whom we are indebted for the first principles of science and the most perfect models of literature and art." For such a cause the English poet, who had become a Grecian patriot, expressed the hope "that all political parties in every European state would unite their efforts." Greek unions sprang up in Germany, France, Italy and Switzerland. In England a loan of 800,000 pounds sterling was raised to aid the Greek cause.

The pressure of European sympathy was not long

in affecting European diplomacy. Russia, whose peculiar position in the East had always enabled her to assume the part of protector of the Christian subjects of Turkey, was the first to attempt to solve the difficulty between the Greeks and the Sultan. But this solution was accepted by neither party; and the Greeks appealed to England for help. From this time began a series of negotiations which seriously affected the stability of the European Concert. England, while protesting against the policy of intervention as interpreted by Metternich, was willing to interfere in behalf of the suffering Greeks and in the cause of humanity; and France was similarly inclined. In 1821 England conciliated Russia to a new plan of intervention, in which agreement the desire was expressed of putting an end to the contest of which Greece and the archipelago was the theater, by an arrangement which "shall be consistent with the principles of religion, justice and humanity." This initial arrangement involved two essential provisions: (1) That the Greeks should pay an annual tribute to the Porte, the amount to be fixed by common consent; and (2) that the Greeks should enjoy complete liberty of conscience, entire freedom of commerce, and should exclusively conduct their own internal government." Upon invitation, France became a party to this arrangement, and at her suggestion these provisions were put into the form of a definite treaty at London in 1827.

The united action of England, France and Russia in behalf of the Greek people was thus an attempt to meet the Eastern situation by a concerted policy of intervention, without reference to the policy that had hitherto been pursued by the "Holy Alliance." It was to carry out the terms of the treaty of 1827

that these Powers now assumed collective authority to deal with international affairs. The determined opposition of Turkey to the terms of this treaty led to an armed interference of the Allied powers for the liberation of the Greeks. This resulted in the destruction of the Turkish fleet at Navarino, and finally in the submission of the Sultan and the conclusion of the treaty of Adrianople in 1829. At a conference of the contracting powers held at London in 1830 it was determined to go still further in the emancipation of Greece, and it was agreed: (1) That Greece should be wholly independent of Turkish control; and (2) that it should be governed by a prince chosen from some family outside of the signatory powers. Accordingly, in 1832 Otto, the second son of the king of Bavaria, became the first king of the new Grecian state, and the guaranteeing Powers continued to supervise the interests of the new kingdom and to maintain its integrity.

The policy of intervention had thus become diverted entirely from the previous purpose of suppressing the popular uprisings—in Naples, Piedmont and Spain, —to the new purpose of granting liberty to the oppressed people of Greece. This change of policy regarding the purpose of intervention was reflected in the change of active co-operation on the part of the members of the so-called "European Concert." The active members of the previous alliance had been Russia, Austria and Prussia; while the active parties of the new alliance were Russia, England and France. In the former case, the concerted powers had intervened, in their own interests, for the crushing of all efforts toward political freedom; while in the latter case, they had intervened for the enfranchisement of

a people struggling for liberty. In the one case, the intervention was based on policy; in the other, on humanity.

§ 5. The Resistance to the Encroachments of Russia

The new turn that was given to European diplomacy after the humane enfranchisement of Greece was directly due to the new and suspicious policy that Russia assumed with reference to the Turkish government. That the Tsar had his eyes still fixed upon the goal that Peter the Great and Catherine had set before them seemed apparent, when after the Greek revolution he almost immediately espoused the cause of the Sultan with as much zeal as he had just shown in the cause of the oppressed Greeks. It was not now as an open enemy but as a generous friend that the Tsar sought to extend his influence over the affairs of Turkey. An opportunity to test the reality of this policy was soon presented. In 1832 Constantinople was threatened by the victorious armies of Mehemet Ali, the rebellious pasha of Egypt. It was at this critical moment that the Tsar offered to the frightened Sultan his friendly aid, and sent his fleet to the Bosphorus and his armies to cover the threatened capital. By the willing acceptance of his proffered aid, Constantinople seemed almost within his grasp; and what Peter and Catherine believed could be accomplished only by means of war, seemed about to be effected by an act of disinterested friendship.

But England and France saw in this act of professed friendship the deeply-laid plot of Russian ambition. They accordingly interfered and, by pacifying

the Egyptian revolt instigated by Mehemet Ali, rendered the proffered aid of the Tsar unnecessary. But no sooner had France and England withdrawn from the field than Russia resumed her influence over the Sultan, and obtained from him a definite treaty of friendship, which made still more evident her real designs. By this treaty (Unkiar-Skelessi, 1833) Russia and Turkey entered into a defensive alliance, promising to aid each other in every event when the security of either was endangered, and also stipulating that the Dardanelles should be closed to the warships of every foreign power.

The significance of this treaty was quite apparent. By thus making an ally of Turkey, and closing the Straits to foreign warships, Russia converted the entrance to the Black Sea into a secure defense, from which she could send her ships of war into the Mediterranean while her own ports and arsenals remained secure from attack. The specific clause of the treaty relating to the Dardanelles affected every power that possessed a naval station on the Mediterranean. This was sufficient to confirm all the previous suspicions of France and England; and it is no doubt true that "to this time rather than to any earlier period belongs the first growth of that strong national antagonism to Russia which found its satisfaction later in the Crimean war."

This growing prejudice against Russia tended more than anything else to revive the collective authority of the European Concert. To prevent the Sultan from again submitting to the adroit schemes of Russia—during the second Egyptian revolt of Mehemet Ali in 1839—England, Austria and Prussia declared that they would henceforth assume control of this new

phase of the Eastern problem. After much negotiation a treaty was finally framed at London in 1840, between these powers and Russia (in which France took no part) which resulted in quelling the ambition of Mehemet Ali, and the temporary pacification of the East.

It has been said that "the conclusion of the struggle of 1840 marked with great definiteness the real position which the Ottoman empire was henceforth to occupy in relation to the Western world. Rescued by Europe at large from the alternative of destruction at the hands of Mehemet Ali or complete vassalage to Russia, the Porte entered upon the condition nominally of an independent state, but really of a state existing under the protection of Europe."

The policy which Russia had adopted from 1832 to 1840 had met with signal failure, on account of the opposition of the Western powers, but especially through the diplomacy of England. The Tsar became convinced that the policy of befriending the Sultan was a policy without recompense, and that the Greek cross would never shine from the dome of Saint Sophia as the long as the powers of Europe were united against him. It was evidently better to conciliate the Powers than to conciliate the Porte; and of the Powers the sympathy of England was the most desirable.

Accordingly, in 1844 the Tsar Nicholas paid a friendly visit to London. He believed that he would find in Lord Aberdeen, the English foreign secretary, a trusty co-adjutor, on account of the latter's devotion to Russia in the Napoleonic wars. It was to Lord Aberdeen that Nicholas first characterized Turkey as the "sick man" whose estate should properly fall into the hands of England and Russia. Nicholas was evi-

dently impressed with the notion that England could be purchased by a division of spoils. Nine years afterward he dangled before the eyes of Sir Hamilton Seymour, the English ambassador to St. Petersburg, the same image of the "sick man," suggesting that the time had come for a clear understanding in regard to a partition of the inheritance. But England declined to enter into any schemes based upon the division of the Ottoman empire; for this empire was, so far as had yet been discovered, the only bulwark against the encroachments of Russia, and of securing to England her route to the East.

But if England could not be reached by motives of robbery, perhaps she could be appealed to as a Christian. England and France had been the allies of Russia in rescuing the Christian Greek from the cruel Turk. They ought certainly not to object to Russia's acting the part of a protector to the Christian communities throughout the Turkish domain. In assuming the attitude of guardian of her fellow Christians, it is perhaps difficult to disentangle those motives of Russia which were based upon humanity and those based upon policy. But it is quite certain that by becoming the protector of the Christian communities she would obtain the right of interfering with the internal government of Turkey, which was a necessary step toward the disintegration of the Ottoman empire and the possession of Constantinople. At least this was the view of England and France. (*Cambridge Modern History*, Vol. XII, ch. 14, "The Ottoman Empire and the Balkan Peninsula," by Wm. Miller.)

Taking advantage of a controversy respecting the guardianship of certain "holy places" in Palestine (which had been raised by France), Russia demanded

of Turkey not only her ancient rights over the sacred spots in Jerusalem, but also the right to guarantee the protection of all the Christian subjects throughout the Turkish dominions. Upon the refusal of Turkey to grant the latter demand the Russian armies were dispatched to the Danube. In reply to this display of force England and France (with the accession of Sardinia) sent their allied armies to the East in defense of Turkey—which resulted in the Crimean War.

If the question be asked, what constituted the European Concert at this time, it may be answered by referring to the principal act of intervention adopted by the European powers. This act was undoubtedly that which resulted from the Conference of London in 1840 of which the parties were England, Austria, Prussia and Russia—or the same powers that constituted the earlier concert formed by the "Quadruple Alliance" after the Congress of Vienna. The diverse theories as to the purpose of intervention, which then distracted the attention of the Great Powers—whether it should be politic or humane, whether for the suppression of liberty or for the securing of liberty—no longer disturbed the mind of Europe. The maintenance of the Turkish empire against the encroachment or interference of Russia was evidently prompted solely by considerations of policy—and the conscience of Europe seemed entirely satisfied with the previous enfranchisement of the Greeks, without regard to the present condition of the other subjects of the Turkish government.

§ 6. The Treaty of Paris and the Recognition of Turkey

The Treaty of Paris of 1856, which closed the Crimean war, formed an important epoch in the history of European diplomacy. It was signed by the representatives of six powers, namely, England and France, Austria and Prussia, and Russia and Sardinia —which now constituted the European Concert. It was intended to put an end to the eternal Eastern Question, to establish a *status quo* for southeastern Europe, and especially to prevent any further interference of Russia in the internal affairs of Turkey. To accomplish this seemingly desirable result, the Ottoman Empire was, accordingly, admitted to all the rights and privileges of a European state, and her full independence and territorial integrity were recognized and guaranteed.

While the Treaty of Paris may have possessed certain beneficial features, the full import and future results of this act of recognition may not have been appreciated by the Allied Powers. But the direful effects of this act might have been deduced from the terms of the Treaty itself. If Russia had now no right to interfere in the internal affairs of Turkey, neither had England nor France, nor, in fact, all the other powers of Europe combined, a right to interfere. To take away any apparent occasion for such interference the Sultan recorded "his generous intentions toward the Christian population of his empire," and the contracting Powers specifically declared in Article IX of the treaty that they had themselves no right "to interfere, either collectively or separately, in the relations

of his Majesty, the Sultan, with his subjects, nor in the internal administration of his empire."

The Treaty of Paris of 1856 was the climax of European diplomacy based solely upon policy. The Concert of Powers had by the fear of Russia abandoned all considerations based upon humanity. What a change had been wrought in thirty years! In 1826 the powers had interfered in the government of Turkey, and had declared that the Greeks should enjoy a complete liberty of conscience and should exclusively conduct their own internal government. They had interfered, too, by force of arms, and had rescued the classic fields of Achaia from the hand of an Oriental despot, and had given to an oppressed people a free and independent government. Such was the diplomacy of Europe at the time of the Greek revolution; but such was not the diplomacy of Europe at the time of the Crimean war. Now the Powers had received this Oriental despot into their arms as one among themselves, and practically declared to his suffering Christian subjects that, whatever might be their wrongs, they must henceforth look to their Mohammedan master and not to Christian Europe for help.

We have now learned that the Treaty of Paris, so far as it related to the Ottoman Empire, was based upon a wretched fiction; and this fiction was that the house of Othman, with its tyrant chief and its hungry horde of pashas, backed by centuries of cruelty and misrule, could by a stroke of the diplomatic pen be converted into a civilized European state. The powers at Paris by a strange infatuation seemed to forget what they had remembered in the Greek revolution—that the real European was the subject of the Sultan and not the Sultan himself—that the Sultan was a compar-

atively late intruder from the steppes of Asia, while the Greek and the Albanian and the Slav had dwelt upon European soil for centuries. In admitting an Ottoman tyrant to the enlightened privileges of Europe, and in relinquishing a European population to the terrors of an Asiatic regime, the Concert of Powers had reduced to a bald absurdity that kind of diplomacy which is based solely upon policy, and which ignores the real interests of mankind. Humanity without policy may be unwise; but policy without humanity is unjust, immoral, brutal. Judged by the technical rules of international law Europe may have relieved itself of all responsibility for the Sultan's misgovernment. But judged by the higher principles of reason and morality, Europe had in fact become an accomplice in his crime.

§ 7. The Turkish Atrocities and the Congress of Berlin

The Treaty of Paris furnished the basis of the European Concert for more than twenty years. It was supplemented by a treaty made at London in 1871, which did not, however, modify any of its essential provisions. The Sultan still remained an independent European sovereign with absolute power to deal with all his subjects as he pleased. If he saw fit to rob and slay the Christian kinsmen of Europe, it was a matter which concerned himself alone, and about which Europe could have nothing to say.

But this strange condition of things could not always last; and the change which took place from the Treaty of Paris in 1856 to the Treaty of Berlin in 1878 was one of the most remarkable in the history

of modern diplomacy. This change, however, took place only when the heart of Europe was touched by the cries of distress which came from the East—from the helpless subjects of the Oriental despot reigning at Constantinople under the collective sanction of Europe.

The first cry came from Montenegro and Herzegovina, provinces bordering upon Austria, whose frontiers were sought as a refuge by thousands of Christians fleeing from their devastated homes. It was then that Count Andrassy, the Austrian minister, joined with Germany and Russia in demanding radical reforms in the Turkish government. The "Andrassy note," in which these demands were formulated, was approved by England and France; and the Sultan promised the concessions required,—but never executed them.

The next cry came from Salonika, where the consuls of France and Prussia had been murdered by an infuriated mob. The ministers of the three empires, Austria, Germany, and Russia, then met at Berlin, and declared that if the representatives of two foreign powers could thus be murdered in broad daylight under the eyes of the powerless authorities, the Christians of the insurgent provinces might well decline to entrust themselves to an exasperated enemy. "The Berlin memorandum" was then drawn up. It demanded that the reforms mentioned in the "Andrassy note," and promised by the Sultan, must be carried out under the supervision of the European powers. All the powers approved of this second demand, except England, which had not yet become alive to the real situation.

The last cry came from Bulgaria, which was a ter-

rific shock, penetrating all ranks of society, and dispelling once for all the "conventional idea of Turkey as a community resembling a European state." The Bulgarian atrocities aroused all the nations of Europe. The bitter indignation of the English people was expressed in these impassioned words of Mr. Gladstone: "There is not a criminal in a European jail, there is not a cannibal in the South Sea islands, whose indignation would not rise and overboil at the recital of what has been done, which has too late been examined, but which remains unavenged; which has left behind it all the foul and all the fierce passions which produced it, and which may again spring up in another murderous harvest from the soil soaked and reeking with blood and in the air tainted with every imaginable deed of crime and shame."

These were words inspired with the spirit of humanity, and expressed the sympathies of the civilized world. But the reconciliation of this humane spirit with the policy embodied in the Treaty of Paris presented difficulties of the most formidable nature. To every suggestion of interference, the Turk could reply that by the Treaty of Paris the European powers had declared the Ottoman Empire to stand on exactly the same footing as any other great state of Europe, and had expressly debarred themselves from interfering, under any circumstances, with its internal administration. With this proposition every purely legal and logical mind would, perhaps, be obliged to concur. But how far strict legality should give way to morality, and how far the logic of diplomacy should yield to the logic of events, were questions upon the solution of which the powers of Europe found it difficult to agree.

The position of Russia was, however, clearly defined, when the Tsar of Russia stated that if Turkey should continue to refuse the reforms demanded by Europe, and if Europe should refuse to enforce these demands, Russia would act alone. England hesitated to absolve herself from the obligations of the Paris treaty, and to trust Russia as the sole executive agent of the European powers. She, therefore, proposed a conference to be held at Constantinople, which should attempt to solve the present difficulty on the basis of a common recognition of the integrity of the Ottoman Empire, accompanied by a distinct disavowal on the part of the Powers of all aims at aggrandizement. This invitation was accepted; the conference assembled, and a solution reached which seemed to reconcile the demands alike of policy and of humanity —to maintain the Ottoman throne and to protect the Christian population.

This plan is worthy of note, as an ingenious step in advance of previous efforts. It seemed to meet the demands of the "Andrassy note" and of the "Berlin memorandum." It demanded of the Sultan (1) the grant of administrative autonomy to Bosnia, Herzegovina, and Bulgaria; (2) the appointment in each of these provinces of Christian governors whose choice should be approved by the Powers; (3) the confinement of the Turkish troops to the fortresses; and (4) the execution of these reforms under the superintendence of an international commission, which should be supported by 6,000 *gens d'armes* enlisted in Switzerland and Belgium. There seemed to be nothing lacking to this arrangement except the acquiescence of the Sultan. But the Sultan logically refused to listen to these demands on the ground that

they were an infringement of the Treaty of Paris. The IXth article of that document had protected him for twenty years and he still proposed to use it as his shield of defense.

Although Lord Beaconsfield did not believe that the resources of diplomacy were yet exhausted, the rest of Europe offered no further obstacle to the progress of the Russian armies, which crossed the Danube in June, 1877, and within a year compelled Turkey to sign the treaty of San Stefano.

It is true that in this war Russia had carried into execution a humane policy which had received the tacit approval of Europe. But it was not the policy of Europe to relinquish to any one power the final settlement of questions having a general interest. It was therefore necessary for Russia at the Congress of Berlin to submit to a re-settlement of her treaty with Turkey. (Fyffe, *Modern Europe,* ch. 25, "Eastern Affairs.")

The final treaty of peace was signed at Berlin in 1878 by the six Great Powers, England and France, Germany and Austria, and Russia and Turkey. In many respects, it shows the remarkable advance which had been made in European diplomacy in twenty-two years. The leading idea of the Treaty of Paris in 1856 had been the full independence and territorial integrity of the Ottoman Empire and the abandonment of its oppressed subjects to the absolute power of the Sultan, as well as the denial of the right of intervention for the sake of humanity. In the Treaty of Berlin all this was practically changed. The Porte, although retaining its position as a European state, was reduced to a condition of tutelage; its jurisdiction was greatly limited; and much of its territory was

taken away and erected into independent or autonomous states. Bosnia and Herzegovina were transferred to the administration of Austria. Roumania and Servia and Montenegro were made free and independent, Bulgaria was erected into an autonomous principality, Eastern Roumelia was guaranteed administrative autonomy under a Christian governor, and liberal provisions were made with reference to Crete and Armenia.

It is not for us to inquire how far the great Powers have been delinquent in their attempt to maintain the peace of Europe. It is, perhaps, enough to say that, in the light of all that has occurred, it is evident that the only sufficient guarantee against oppression is independence, and that Europe has solved the Eastern Question to the extent and only to the extent that it has enfranchised the Christian people of Turkey. The Treaty of Berlin is an evidence of the fact that the best policy must be humane as well as adroit, that the deepest sentiments of justice cannot be crushed by a technical adherence to legality, that the rules of international law must respond to the enlightened conscience of mankind. In doing what it was gradually compelled to do, the Concert of Powers committed itself to the general cause of human freedom, as against the claims of despotic government. It gave its sanction to the principle that the cause of humanity is a just and sufficient ground for interfering in the internal government of a state, even though that state has been recognized as having the legal rights of independence and sovereignty—that legal sovereignty affords no protection to moral obliquity.

In spite of the many humane features of the Treaty of San Stefano, which excited the jealousy of the Euro-

pean powers and resulted in the modified Treaty of Berlin, the history of the Concert of Europe, based either on the "balance of power" or the general "policy of intervention," has proved its inadequacy to keep pace with the changing conditions of the world. Scarcely was the Congress of Berlin dissolved than it was succeeded by a new alignment of nations, consisting of the "Triple Alliance" and the "Triple Entente," which, embittered by growing animosities, resulted in the horrors of the Great War. Whether the latest attempt to effect a world concert and a world peace, based upon the "League of Nations," will be successful it is impossible to say; but the experience of the past may afford some lessons as to the difficulties to be met and the dangers to be avoided.

CHAPTER X

HISTORICAL DEVELOPMENT OF PEACE: VARIOUS METHODS OF APPROACH TO THE WORLD PROBLEM

"Peace is in the heart of all civilized men." Such were the words which, some years ago, greeted the delegates at the openeing of the International Peace Conference. We have no account of how these words were received; but, being a body of men devoted to the cause of peace, they were doubtless enthusiastically approved. While it may be true that all civilized men have ever been hopeful of peace; it seems quite as true that they have always been apprehensive of war. Men may cry, "Peace, Peace," when there is no peace. It must be confessed that war has been a prominent factor in the world's history; and that it has required far more wisdom and skill to prevent the conflict of nations, than to promote such conflicts. Certainly, the most valued victories of the human mind have been in the domain of peace, and not in that of war.

It may, perhaps, seem an idle pretense to presume that anything new can be said upon a question that has so severely taxed the thought of philanthropists and statesmen as that relating to the possibility of a permanent peace. It may not, however, be wholly unprofitable for us to survey the different points of view from which this question has been and may be considered. Such a comparison of views may help

us to see the relative value of the various methods of approach to this world problem.

§ 1. Ethical Appeals to the Pacific Sentiments

The first and perhaps most usual mode of approaching this problem is based upon sentimental appeals to the finer instincts of human nature. The efficiency of this method is supposed to be in direct ratio to the vividness with which the horrors of war can be portrayed. Pacific homilies, inspired with the exalted spirit of the golden rule, are pronounced in unqualified condemnation of military establishments and all those physical agencies which nations are accustomed to adopt for the protection of what they regard as their moral and legal rights. "We know," recently wrote the President of the Universal Peace Union, "we know the horrors, the bankruptcy, the cruelty, the wickedness, the inexpediency of war and the military system, and we know the blessings of peace." And this writer proceeds with more or less reason, to impeach the nations of the earth for "upholding military academies, organizing their men into armies, spending their substance in fortifications and battle-ships, coveting their neighbor's territory, sailing over seas and laying claim to lands far beyond their homes, and cowering with military power the weak, the defenceless and less favored."

War seems to be regarded by this class of writers as merely the outcome of the more brutal passions of men, the assuaging of which will lead to the pacific result desired. The remedy for war and the conditions of universal peace proposed by such advocates are chiefly ethical and educational—"self-control, peace within ourselves, less of selfishness, the doing

to others as we would be done by, no whipping of children, no warlike playthings, no war stories, no military drills, no boys' brigades, a love superior to any man's hate, respect for human life upon the scaffold as well as upon the battle field, the stopping of appropriations for battle ships and fortifications. Emperors and kings and others in power will realize in time that all these things make for the prosperity and happiness of the people, for the people then will be employed in following after those things which make for peace."

These statements may be regarded as typical of a considerable body of peace literature, which seems to proceed upon the theory that war can be abolished by a process of earnest exhortation. It must be admitted that the motives which prompt this kind of literature are pure and lofty; and do not always merit the ridicule which they sometimes receive at the hands of worldly-minded publicists. It is true that sentiments often determine the course of conduct; and a strong pacific impulse on the part of the people has often, no doubt, acted as a restraint upon an aggressive policy on the part of the government. Moral exhortations are by no means to be discouraged; but it must still be a question, how far in our present international system, they can furnish any sufficient guarantee for the protection of the sovereign rights of states, or any redress for injuries actually received or threatened.

The efficiency of such appeals to the pacific sentiments will, however, be seen to be greatly overestimated, when we consider the existence of other sentiments as deeply seated in human nature and quite as powerful in the determination of opinion and con-

duct. The horrors of war, when abstractly considered and pictured to the imagination are repellant in the extreme; but when associated with the preservation of a nation's honor, they become objects of a certain kind of admiration, and their endurance is often viewed as evincing the noblest spirit of devotion and sacrifice. A human body pierced with hostile spears is a pitiful sight to behold; but when the body is that of Arnold of Winkelreid in the battle of Sempach, the sense of pain disappears in admiring the prowess of a patriotic soldier. The deadly charge at Balaklava, the bloody angle at Spottsylvania, and the victorious sacrifice at Belleau Wood, become transformed from an object of horror into a picture of heroism when it becomes set in a nation's history. The fact that the horrors of war are thus often neutralized by the heroic sentiments with which they are sometimes viewed, furnishes, of course, no justification for war; it simply shows that mere appeals to the pacific sentiments will be comparatively weak so long as sacrifice and suffering are considered as inevitable incidents in the protection of a nation's life.

The real difficulty which lurks in the purely sentimental method of dealing with the question of peace and war, consists in the fact that in the intense anxiety to obtain peace there is furnished no satisfactory substitute for war. Peace, however desirable it may appear to its advocates, cannot in the nature of things be perpetual as long as society seems unable to accomplish in a peaceful way those ends which are now accomplished only by war. To appreciate the force of this statement it is necessary to consider the legitimate place which war has occupied in the international system.

Every nation, as an organized aggregate of human beings, possesses those fundamental rights with which human beings themselves are endowed, namely, the right of existence, the right of honor, and the right of property. It is evident that rights can be secure only when guaranteed by an authority which has the power to protect them against infringement. In the absence of any higher authority than that of the nation itself, each nation must be the judge and enforcer of its own rights. To secure its rights from infringement its force must be organized and made efficient. Armies must be maintained and navies must be built; and, as a last resort, these must be actually employed to protect the nation from injury and to punish the wrong doer. War may thus be the employment of force for the protection of rights. It is the ultimate remedy for a wrong committed or threatened; and in the absence of any other remedy it is difficult to see why it is not a necessary and legitimate exercise of sanctioning power.

With all due respect, therefore, to the sentimental or purely ethical advocates of peace and with all due respect to their laudable efforts to mitigate the horrors and excesses of war, it seems the height of folly to talk of perpetual peace while the rights of nations are indefinitely determined or inadequately guaranteed.

§ 2. Ideal Projects for an International State

But all the advocates of peace have not relied upon mere appeals to sentiment. Among the most interesting speculations of modern times are the attempts to formulate schemes of perpetual peace based upon some kind of international organization, so constructed

that the rights of each nation may be guaranteed without an appeal to arms.

Those who have adopted this method of solving the problem of peace have proceeded upon the theory that under the present system war is a necessity, which can be abolished only by the creation of some adequate substitute for war. Without disparaging the cultivation of the pacific sentiments they have sought to establish an institutional basis for peace. These different plans have varied in definiteness from the vague idea of a universal Christian commonwealth to fully elaborated schemes of an international super-state, with its various powers distributed in a manner analogous to that which marks the organization of individual states. It is unnecessary for our purpose to describe in detail these various schemes. Their chief merits and defects will be sufficiently evident by calling attention to some of their most essential characteristics.

To Henry IV of France has been usually ascribed the earliest of these projects of perpetual peace. This scheme, or "Grand Design," of Henry IV, as summarized by Sir George Cornwall Lewis, "proceeded on the basis that the religious creed of each Christian European country was to be recognized and maintained; that the infidel powers should be expelled from Europe; that Europe should be repartitioned with a view mainly of diminishing the power of the house of Austria; and that a federal council, with a federal army and navy, for all the European states should be established. By this means it was thought, a perpetual peace would be preserved among the members of the great Christian republic."

The plan thus described seems entirely consonant

with the noble spirit of the King who issued the Edict of Nantes, inspired, as he no doubt was, by the Duke of Sully. Its practicability, however, may be judged by those who consider what would be involved in the attempt to draw the new divisional lines necessary for the repartitioning of Europe, and also in the attempt to solve the Eastern question by driving out the Infidel, especially if it should be found necessary, as Henry IV suggested, to drive out the Muscovite along with the Turk. The serious attempt to pacify Europe by cutting up the sympathetic powers and by driving out the disaffected ones, would probably have provoked wars quite as disastrous as those which afterward attended the less laudable schemes of Louis XIV.

The plan of Henry IV furnished the basis of the more remarkable and elaborate project of the Abbé de Saint-Pierre, a publicist and influential writer of the early part of the eighteenth century. Having been present at the conference at Utrecht and being impressed with the difficulties of settling the terms of that Peace, Saint-Pierre resolved to draw up a plan of international organization by which the Peace of Utrecht should be made perpetual. This plan was first published in 1713, and afterward elaborated in a work published in 1729. The scheme was intended to maintain the equilibrium of forces among the various European powers and to furnish what was thought to be an adequate means of adjusting their differences. The five articles which contained the essential features of this interesting project may be epitomized as follows:

(1) That a perpetual alliance be established between members of the European League, or Christian republic, for their mutual security against both foreign

and civil war, and for the mutual guaranty of their respective possessions and of the treaties of peace concluded at Utrecht.

(2) That each ally contribute to the common expenses of the general Alliance a monthly contribution to be regulated by the general assembly of their plenipotentiaries.

(3) That the allies renounce the right of making war against each other and accept the mediation and arbitration of the general assembly of the league for the termination of their mutual differences—three-fourths of the votes being necessary for a definite judgment.

(4) That if any of the allied powers should refuse to carry into effect the judgments and regulations of the grand Alliance, or negotiate treaties in contravention thereof, or prepare to wage war, the alliance should arm and act offensively against the offending power until it was reduced to obedience.

(5) That the general assembly have the power to enact by a plurality of votes all laws necessary and proper to carry into effect the object of the Alliance; but no alteration in the fundamental articles to be made without the unanimous consent of the allies.

The general European assembly, as proposed by Saint-Pierre, was to consist of the representatives of nineteen principal sovereigns and states, arranged in a certain order of precedence from the king of France to the king of Sardinia, each representation having a single vote, while the smaller republics and princes were conjointly to be represented by a single collective vote. It was thus proposed to establish a sort of super-state, or "League of Nations," which was expected to ensure the permanent peace of Europe.

The chief defects which have been attributed to this

scheme are these: (1) it made no provision for representation other than that of the sovereigns; (2) it gave to the Powers that constituted the League an arbitrary and dictatorial authority over its members; and (3) it aimed to establish a permanent *status quo,* which in the natural progress of historical events would become a fiction. Its ostensible merit, in the minds of some, consisted in the provision, if properly carried out, to organize the force of the different states into a common coercive power sufficient to guarantee the rights of each nation against infringement —such force being a sort of international constabulary.

Rousseau was so impressed with the plan of Saint-Pierre that he published a work in 1761 for the enforcement of its principles. "If there be any practical means of avoiding the evil of war," reasoned the French philosopher, "they must be sought for in the establishment of confederacies, by which distinct communities may be united together in the same manner as the individual members of a particular state are now united in one society. The European public law, founded upon no fixed principles, has incessantly varied, and the general sense of insecurity has compelled even the most pacific states to maintain permanent military establishments, disproportioned to their resources and oppressive to the people."

The establishment of a European confederacy, fortified with legislative, judicial and coercive powers, did not seem to Rousseau to be attended with any insuperable difficulties. "It is only necessary," he claimed, "that statesmen should renounce the puerile prejudices of their craft; that sovereigns should abandon the uncertain objects of vugar ambition for the

certain security that would be afforded to themselves, their dynasties and their people by the proposed innovation; and that nations should relinquish those absurd prejudices which have hitherto induced them to consider the differences of language, race, and religion, as constituting insurmountable obstacles to a more perfect union among the members of the great European family."

To an idealistic thinker like Rousseau it is difficult to understand why society should not speedily conform to the requirements which he regards as so simple and so essential to the peace and happiness of mankind. But it has been well observed, "the fact that a hundred years and more have elapsed, and that these simple requirements are unattained, must be admitted as an indication that if not unattainable, they present greater difficulties than Rousseau contemplated."

It would lead us too far from our main purpose to dwell longer upon these ideal schemes for the pacification of the world. If we should examine the plan of Bentham for the disarmament of Europe, the enfranchisement of all colonial dependencies and the establishment of a common court of judicature—or the plan of Kant, in his treatise "On Perpetual Peace," for a general Congress of nations—or the more recent plan of Professor Lorimer, a Scotch publicist, for the establishment of what he calls "the international equivalents for the factors known in national law as legislation, jurisdiction and execution,—we should find that, however they might differ in details, they were all characterized by one prevailing feature. They are all, to a greater or less extent, *idealistic*. They are largely the products of the imagination. They seek to construct an international organization based upon

preconceived ideas." (Philips, *Confederation of Europe*, pp. 18–32, "Earlier Projects of Peace.")

The radical defect of the method employed by the ideal projectors of international peace, has been so thoroughly exposed in the writings of political scientists that it need scarcely to be seriously considered. If state constitutions *grow* and are not made, much less can it be expected that an international organism can be brought into being by any sudden process of manufacture. The ideal method as applied to international politics may, in fact, be regarded as far less fruitful than that which we have called the sentimental or ethical method. The cultivation of the pacific sentiments may be regarded as furnishing at least one essential condition to the realization of a general peace; but it is not necessary to suppose that an international society must accord with the structural forms embodied in any of the theoretical projects for peace. Indeed it may be a question whether these theoretical projects have not done more to obstruct the cause of peace than to aid it. Those who have been led to repose their faith in these Utopian pictures have been doomed to sad disappointment as they have watched the passing years, and observed no sign that their artistic lines and colors were reproduced in the harmonious reconstruction of the world—and the repetition of such disappointments naturally leads to indifference, if not to despair. Noble sentiments, like those of the pacifist, and lofty ideals, like those of the philosophical thinker, may each have their place as worthy incentives to high endeavor; but it seems quite clear that neither can furnish a sufficient guide to point out the actual steps that should be taken in the course of human progress.

§ 3. Historical Method Based on Social Evolution

To those who are accustomed to more realistic modes of thinking, it must be apparent that the hope of peace, if it have any adequate basis at all, must rest upon something more substantial than mere appeals either to the sentiments or to the imagination. If the international system ever reaches a higher and more complete stage of organization, this result must doubtless be attained through a process of development, in harmony with the laws of social evolution; and by the selective utilization of agencies that already exist.

To hope for a sudden and radical transformation of the whole international system is quite as chimerical as to expect a suspension of the laws of progress in the political or industrial world. Even though such a radical change could be temporarily effected, it needs no prophetic vision to foretell its doom. Like the commonwealth of Cromwell or the revolutionary empire of Napoleon, it would soon be dissipated, and slower and more realistic methods of progression would assert themselves.

To claim that a general condition of peace, if it be attained at all, must be attained through a process of evolution, and be the result of agencies which already exist, might seem at first sight to threaten the entire fabric of hope which idealistic reformers have been at so much pains to construct. If, however, it could be shown that the progressive pacification of society was a necessary concomitant of social evolution, our hope of an ultimate peace, instead of being shattered, would become as substantial and se-

cure as our faith in human progress. If, moreover, we could discover the agencies and methods by which among the lower groups of mankind hostility has gradually given place to harmony, we might perhaps obtain some idea as to the methods in which the relationship between the higher groups of mankind might also be harmoniously adjusted.

The highest stage of political development that has been attained in modern society is indicated in the national organism, or the sovereign state. So far as the *internal* relations of the modern normal state are concerned, it would not be an exaggeration to say that the conditions of peace have already become well nigh realized. With the exception of those instances in which political power and political freedom have not become thoroughly adjusted, it may be said that each nation, to a great extent, represents within itself a pacified area of human society. Rights are generally determined and maintained, for the most part, without an appeal to force; the hostilities of war are, in large measure, removed to the external relations between independent states. But this condition of comparative pacification, which exists within the area of the modern civilized state, it must be evident is itself the result of a slow process of development, or the successive integrations of smaller and still smaller independent groups of men.

If we should reverse the panorama of human progress for a few centuries, we should come to a condition of things quite different from that which now presents itself. Instead of a few comparatively well organized, compact nations, we should see in France fifty or sixty independent principalities, each maintaining its rights against the others by means of private war-

fare. We should see in Italy a large number of petty states engaged in incessant dissensions and conflicts. In Germany we should come back to a loose confederation of kingdoms, duchies, and cities which were ruled for a long time by "fist law" and the right of the stronger. We should find in England a group of hostile tribes of the "Heptarchy" engaged in mutual encroachments and struggles for overlordships.

If we should continue this process of historic reversion, we should see in more ancient times the Roman Empire, with its boasted *Pax Romana*, dissolved into its constituent elements,—the tribal communities of Italy, the independent cities of Greece, and the innumerable tribes of Kelts, Berbers and other races. And finally we should see the whole European world fading away into clans or wandering hordes, whose only methods of maintaining their rights of existence and property was by brute force, self-help, blood revenge.

§ 4. Progressive Enlargement of the Areas of Peace

It was a political postulate of Hobbes that the primitive state of mankind was that of war; and historical research does not seem to weaken this hypothesis. In this primitive state, the exercise of hostile force was not limited, as it now practically is, to the settlement of long standing controversies between great communities of men; but every conflicting issue between clan and clan, between tribe and tribe, was summarily terminated with blows and blood. The area of peace was confined to each clan or tribe. This conception of early society is not purely hypothetical. Nothing

seems to be more firmly established than that "all the races of the great Aryan branch of mankind have developed through a common plan of organization in which each group—sometimes merely the circle of near kindred, at other times enlarged into the gens or sept —was a unit in respect to other similar aggregations in the tribe or nation." The study of comparative jurisprudence, moreover, shows that the beginnings of law and order are attained only by the gradual repression of private warfare, and the gradual union and pacification of the elementary groups. Each successive expansion of law and enlargement of society is attended by a greater restriction of private warfare and by an increase of the area in which peace is secured. Looked at from this point of view, therefore, the evolution of human society may be described as the *progressive enlargement of the areas of peace.*

This view that social evolution is characterized by the evolution of peace may seem to be at variance with one very essential condition of evolution itself, namely, the struggle for existence, which is often considered as but another name for war. It is true that with the early man the chief and perhaps the only interest was connected with the means of obtaining subsistence. As with the brute, life was indeed a struggle for existence, and this was at first a *competitive* struggle. Each man saw in every other man, who was not a member of his own clan or tribe, a foe—a natural enemy in the battle for life. Every fruit-bearing tree, every hunting or fishing ground, became a theatre of war to these early competitors in the struggle for existence.

But even the early man soon learned that in union there was strength, and that by allying himself or his

own group to another man or to another group of men, his power to obtain food was increased. Man gradually found in his fellow man an aid, instead of an enemy. Clan united with clan for mutual protection and help in the struggle for existence. With the growth of common interests the lines of hostility between elementary groups were thus gradually effaced, or removed to the boundaries between larger and larger groups of men. The *competitive* struggle for existence became more and more transformed into a *coöperative* struggle. The desire to conquer and destroy one's fellow man became qualified by the common interest and desire to triumph over nature, from which all subsistence is derived, and to reduce its forces to productive ends. The communal holding of land and the common tillage of the soil mark this pacific stage in the growth of early society. With the division of labor, the communal or collective form of industry was supplemented by specialized and distributive industries, by which the members of any given group were made more dependent upon one another, and were also brought into pacific relations to other groups. Every specialization of industry tended to increase this interdependence, and to make necessary these inter-groupal relations. One of the tendencies, therefore, of industrial evolution is to favor the *integration* of social groups—the conversion of the competitive struggle for existence into a coöperative struggle, and consequently the enlargement of the areas of peace. (Freeman, *Comparative Politics*, pp. 99–136; Coulanges, *Ancient City;* Hearn, *Aryan Household.*)

§ 5. The Growth of Peace within the National Domain

It would be difficult to analyze all the various agencies which have led to the elimination of war in the early stages of human progress, and which have paved the way for that relative pacification of society that we now see within the limits of the modern civilized state. But some of the most important steps by which this result has been attained may be briefly noted.

(1) In the first place, without attempting entirely to abolish private warfare, efforts are made to restrain somewhat the feeling of vengeance and to restrict the exercise of force on the part of the individual. Still later the attempt is made to expiate the feeling of vengeance by the payment of a money compensation. It is not long before there grows up the idea of the "folk-peace," that is, the idea that the community has a right to maintain peace within itself. The one who breaks the peace is called the "Peaceless man," (*friedlos*); he is made an outlaw, and he may be slain by anyone—or else the vengeance of the community may itself be expiated by the payment of "peace-money." "Peace guilds" are established, bound by the "peace pledge," in which each member is made responsible to the rest of the community for maintaining the peace. And still later, "officers of the peace" are appointed to see that the public order is not disturbed by an act of hostility. In this way the exercise of private force becomes gradually restricted, and the area of peace becomes more and more extended, until it finally reaches the boundary of the nation itself.

(2) Another means employed for the elimination

of war and the development of peace within the civilized state, is found in the attempt to furnish some substitute for private force in the settlement of disputes. This is seen in the beginning of arbitration and of judicial procedure.

The earliest form of a regular judicial process with which we are acquainted in Europe, and which Sir Henry S. Maine declares "is the undoubted parent of Roman actions and, consequently, of most of the civil remedies in use in the world," warrants us in drawing two conclusions: first, that legal procedure was intended to furnish a substitute for private warfare; and, secondly, that the substitute it furnished was a form of arbitration. This early judicial action, called by the Romans the *actio sacramenti,* is fully described by Gaius, an eminent Roman jurist. He describes it as a symbolical process, beginning with what represents an armed conflict between two combatants, wrangling with their spears over a piece of disputed property, when an officer interferes and compels the disputants to cease their quarrel. After an altercation, in which each party sets forth his claim, the case is referred to a private person, called a "judex" or "arbiter," who examines the claims and renders a decision.

This primitive form of a judicial action thus begins with an altercation and ends with an arbitration. It was, in fact, the beginning of the judicial system of the Romans, and became, as Mr. Maine asserts, the basis of the judicial procedure now existing in most of the civilized countries of the world. It would not, therefore, be incorrect to say that, in its essential features, the legal process by which civil disputes are now pacifically settled is a highly developed and or-

ganized system of arbitration. (Maine, *Early Hist. of Institutions,* ch. 9, "Primitive Forms of Legal Remedies.")

(3) In connection with the pacific agencies thus far noticed, there also takes place, in the evolution of the modern state the gradual definition of legal rights and duties. It is a well-established fact that the civil law, in its earliest form, is not the result of statutory legislation. It rather begins with the judicial enforcement of what are regarded as the existing customs of the community.

These customs represent the prevailing habits of the people, and are, in their origin, for the most part, the unconscious product of the social life. They become crystallized by traditional observance, and are maintained through judicial sanctions. Each judicial decision furnishes a precedent for future decisions, thus resulting in a body of customary or common law. The fact that the customary law does not meet all the needs of an advanced society leads to the necessity for statutory legislation. It is in this way that the growth of a system of customary and statute law, which controls the acts of individuals, is a powerful agency for the elimination of private warfare and the promotion of peace throughout the nation. (Maine, *Ancient Law,* ch. I.)

(4) Furthermore, with the progressive organization of society, the state becomes more and more conscious of its own corporate will, and assumes the coercive power hitherto scattered among its constituent members. The individual thus becomes an integral part of the social organism. His relation to other individuals, instead of being a matter of purely personal interest, becomes a subject of concern to the

entire body-politic, to be adjudicated by the organized reason and will of the community at large.

The various steps and agencies which have thus far been traced as marking the evolution of peace within the national society may be briefly summarized as follows: (1) the restraints put upon vengeance and the exercise of private force; (2) the settlement of private disputes by the growth of arbitration and legal procedure; (3) the definition of legal rights through judicial interpretation and legislative enactment; and (4) the growth of organized society with a common coercive power. By these methods there has been gradually evolved that condition of relative peace which prevails to a large extent within the area of the modern civilized state. It cannot, of course, be maintained that the condition of peace has become perfectly realized even within the limits of any modern state, except so far as the agencies mentioned have become completely effective in subduing the lawless elements of society.

But with all necessary qualifications, we may feel justified in holding to the proposition that the evolution of human society has been characterized by the progressive enlargement of the areas of peace, and that this movement, beginning with the elementary groups of mankind, has been maintained, with more or less continuity, until it has reached the modern sovereign state, or that political organism which forms the constituent factor of the present international system.

§ 6. Initial Steps toward International Peace

How far these conclusions have any bearing upon the growth of an international peace is a question

the answer to which can be scarcely more than suggested within the limits of our present discussion. That the pacific tendencies which have been active for centuries in the growth of the national society have yet reached their final goal, it is difficult to believe. It is also quite as difficult to believe that these tendencies which have been so slow in their operation in the evolution of the national system will effect a sudden and radical transformation of the whole international society. If however we should continue to apply the historical method, which we have thus far attempted to follow, we may perhaps ascertain how far the conditions of peace have or have not been realized in international relations; and what are the pacific agencies already developed which may be utilized to advance the general cause of peace.

It is sometimes asserted that, in its international relations, Europe is still in a state of barbarism; that however civilized the several states of the world may be in their internal affairs, in their external relations they are still pursuing the methods of savages. It is no doubt true that war, as a mode of settling disputes, is a survival from a more primitive condition of mankind; and that it seems to be out of harmony with the more rational and judicial methods which prevail, to a large extent, within the states themselves. This is true simply because those large social groups which we call "nations" are in a condition, in relation to one another, quite similar to that of the smaller social groups before they were pacified and united into nations. But to suppose that the present international relations of the world present the same phase of absolute hostility that existed among the primitive groups of savages, unrestrained by any pacific influences

whatever, is to ignore more than three centuries of European history.

It should be remembered that there has been not only an international history of war; there has also been an international history of peace. The same pacific agencies which have been referred to as operating within the area of the national domain, we may see in the progressive steps already taken in the direction of an international peace. To verify this statement, it will be necessary simply to call attention to some of the rules and regulations which have been developed and accepted by civilized states in their relations to one another. These will be seen to be in general accord with the progressive steps already followed in the pacification of the states themselves, for example:

(1) In the first place, the attempts made within the national society to throw up barriers against the unrestrained exercise of force in the conduct of private warfare, have been reproduced, to a certain extent, upon the more extended field of international warfare. This will be evident if we call to mind some of the provisions contained in the so-called "rules of war," which formed a part of the accepted "Law of Nations" —that is, before the late war. Specific examples of such provisions may be summarized as follows: The growing conception that war is not an act of unrestrained vengeance, but a regulated mode of redress —the tendency to confine the conduct of hostilities to combatants in the field—the respect paid to the rights of non-combatants, whether in the field or outside the theater of war—the efforts to prevent the use of poisonous gases, and of explosive missiles below a certain weight—the condemnation of pillage and

plunder in occupied territory—the exemption from destruction of private property on the land, and of all public property of a non-hostile character—the general recognition of the restraints imposed by the Declaration of Paris (1856) upon privateering, and upon the capture of enemies' property under a neutral flag—the humane efforts made by the Conventions of Geneva (1864) and of St. Petersburg (1867) to protect the sick and wounded, and to regard as neutral all ambulances and military hospitals and all persons engaged in the medical service.

These specific provisions are sufficient to show the laudable efforts that had been made in the international society to restrain the undue exercise of force and to prevent the inhumanities of war before the year 1914.

(2) In the next place, the attempts made within the area of the modern state to introduce rational methods of settling disputes in place of the earlier modes of private redress and blood revenge, have been reproduced upon the higher plane of international conflicts. This is being effected through the growth of diplomacy and the establishment of legations—through the agency of treaties and conventions—through the calling of congresses and conferences—and through the use of mediation and arbitration.

It is especially in the growing respect paid to arbitration as an international remedy and as a basis for judicial procedure that the earlier stages in the evolution of peace are continuing as a pacific factor. It is significant that while international arbitration was not often used before the last century, since 1815 it has been appealed to in an increasing number of cases; and it is to the credit of the English-speaking

people that the United States and Great Britain have led the way in this mode of settling disputes.

When we consider that arbitration, in its essential nature, is the foundation of nearly all modern judicial procedure, we may be convinced that there has been made some substitution for war as an international remedy, and an encouraging approach toward the judicial settlement of disputes. The laudable efforts made by the Hague Conference to establish, upon the customary principle of arbitration, a kind of supreme judicial authority, were, at least, an anticipation of a Permanent Court of International Justice.

(3) Moreover, when we take account of what has been suggested as the next progressive stage in the enlargement of the areas of peace,—namely the definition of rights and the growth of a body of law —we find that, up to the beginning of the late war, there had been developed a generally accepted body of international law. While the "Law of Nations" has been largely based upon antecedent customs, it has passed beyond the mere stage of customary law. The rights and duties of nations have been more or less clearly defined in the writings of the great publicists. Their definitions and precepts have been accepted, to a large extent, in the diplomatic correspondence of different states. They have, in a marked degree, influenced the policy of many nations in their intercourse with one another. The policy of one state, or group of states, has become a precedent for other states, until a large body of legal principles have received the practical approval, either tacit or expressed, of the civilized world.

When the customary law has seemed inadequate to meet the historic changes due to national development, it has been supplemented by the calling of congresses

and conferences, the decisions of which have taken somewhat the form of statutory legislation. International unions and corporations have also been formed to administer certain matters of general interest. As examples of the beneficent effect of these unions may be mentioned the following: the Universal Telegraph Union, formed in Paris in 1865; the Universal Postal Union, formed in 1874, the Union for the Protection of Industrial Property, (such as trade-marks, patents, etc.) created in 1883; the Union for the Protection of Works of Art and Literature, in 1885; the Union of Railroad Transportation, etc. There are said to be more than thirty of such unions; they have formed an international bond between the various interests of different countries, which may be regarded as a sort of international administrative law.

(4) It is with respect to the last mentioned agency which we have noticed as extending the area of peace, —namely the growth of a distinct political organization with a common coercive power,—that the tendency toward a permanent peace seems less apparent. There has been hitherto little disposition on the part of the Great Powers to create a common authority capable of giving an adequate guaranty to international rights. And any proposal to constitute such an authority has been looked upon by practical statesmen as little less than chimerical.

But in spite of the national prejudice against yielding up directly any sovereign powers to create a higher sovereignty, it is yet true that some steps have been taken toward the indirect recognition of some such authority. This has not assumed the well-defined character of a "super-state," so fondly projected by idealistic reformers. It has rather grown out of the

sympathetic concert of action on the part of the Great Powers in respect to matters of common concern. The acts of the chief congresses—from that of Westphalia to that of Berlin, together with the so-called "Concert of Europe,"— have been more or less efficient in controlling the action of disaffected states, by the treaty guarantees with which they have been accompanied. While such guarantees may fall short of those which might be afforded by a common sovereign power, their pacific significance cannot be entirely ignored.

From this review we may, perhaps, be able to see to what extent the growth of the international society has followed the principal steps that have been observed in the previous stages of social development, and the encouraging results that had been attained before the war of 1914.

§ 7. The Historical Significance of the World War

In the light of these facts, the question may arise: What is the real significance of the recent World War, and what are the lessons to be drawn from it? Does it, or does it not show that the world is now ready for peace? It is sometimes assumed that the international system, that existed before the outbreak of the recent hostilities, has practically broken down. It is no doubt true that the Powers that initiated the war were consciously determined to abolish the international rules already accepted by the civilized portion of mankind. A more significant fact, however, is this, that the most civilized states of the world were united in the effort to protect and maintain the principles of the law and the tendencies toward peace so far as they had already been developed.

From our present point of view, whatever may be our attitude at this moment, the late war may be resolved, as a matter of fact, into a conflict between the *law-breaking* and the *law-abiding* nations of the world. That the former group of nations, (or the governments by which they were represented) are properly designated as "law-breakers" is evident from the simple fact that they persistently refused to recognize the binding force of the accepted "Law of Nations." Long before the announcement of hostilities they had poisoned the minds of their people with the idea that the law was based not upon justice, but upon autocratic power; that obedience to its mandates was dependent, not upon the people's will, but upon the supremacy of military force. In their diplomatic negotiations they repudiated the importance of arbitration as a preventive of war, and ignored the obligations imposed by international treaties.

In the conduct of the war they spurned most of the humane provisions that had already been made for the restraint of vindictive and barbarous methods of procedure. While in the possession of occupied territory they encouraged pillage and plunder; they disregarded the legitimate rights of the subject people; they devastated and depopulated the conquered lands and destroyed the industrial resources of the country. They destroyed indiscriminately public and private property of a non-hostile character, laying wanton hands upon cathedrals and libraries and the private homes of citizens. They paid no respect, on land or on sea, to the rights of non-combatants or of the laws of neutrality. They were guilty of inhumanity toward prisoners of war. They made war upon women and children, upon the weak and the wounded, and even

upon those engaged in medical and other philanthropic service.

It must be observed that, in all these respects, the military authorities prompting the invasion disregarded and set at nought the pacific principles and humane rules of warfare that had previously been developed and accepted by the civilized nations of the world. In short, by the international adoption of a barbarous policy, by thus trampling upon the rights of humanity and ignoring the pacific tendencies of the past, they placed themselves outside the pale of civilization, and acquired the status of international bandits—the common enemies of mankind. For these reasons it must be said that the recent World War can be regarded as nothing less than a destructive interruption of the cause of peace, a painful parenthesis in the course of human progress.

The world was, perhaps, never more hopeful of a rational peace than it was at the opening of the Second Hague Conference. But the refusal of the Kaiser to permit his delegates to take part in the discussion relating to the limitation of armaments threatened to obstruct the further progress of mankind, so far as it concerned the amelioration of war. The world was, perhaps, never more anxious for the future than when renewed hostilities broke out at the invasion of the neutralized territory of Belgium. And, perhaps, the world was never more cast down and depressed than when it witnessed the havoc wrought by the devastations of the war. Men were inclined to question whether there were any fragments left from the previous peace of Europe, or whether the previous hope of the world had not vanished in a hopeless ruin.

§ 8. The Present World Problem in the Light of History

But the world is again looking forward to a condition of universal peace—but with concern as to how it may be reached. The present world-problem is, no doubt, as serious as it has ever been, and equally as difficult of solution. It cannot, of course, be expected that a state of perfect peace can be reached by a sudden regeneration of human nature, or by an abrupt reconstruction of the whole international system. It must be evident that a higher condition of peace can be attained, or at least approached, only by conforming to the laws of human progress—by utilizing the wise lessons taught by experience—by advancing along the historic pathway that had hitherto led to larger and larger areas of peace—in short, by conserving the pacific results already attained, and making these the basis for further development.

It must not be supposed that the present effort is a new and hitherto untried experiment. Nearly all the great European wars have, in fact, been followed by laudable attempts to solve the problem of peace. The Peace of Westphalia, which closed the Thirty Years' War, sought to secure the peace of Europe by readjusting the frontiers of the different states and adopting the principle of the "balance of power," as well as by recognizing the right of "intervention." The Peace of Utrecht, which terminated the War of the Spanish Succession, was intended to maintain the general peace by carrying out more fully the provisions made at Westphalia, by fixing more securely the frontiers of nations, and by guaranteeing the previous equilibrium by treaty stipulations. The Con-

gress of Vienna, which followed the Napoleonic Wars, was professedly designed to effect the pacification of Europe by "dividing the spoils of the vanquished among the victors," and by an attempt to secure the domination of the Great Powers through the so-called "European Concert." The Congress of Berlin, which was the sequel of the Russo-Turkish War, had for its purpose the final settlement of the Eastern Question by the delimitation and pacification of the Balkan states.

In looking over these most conspicuous efforts to secure the peace of Europe, it will be seen that they have been based chiefly upon the attempt to readjust and stabilize the frontiers of the old and the new states, and to prevent mutual encroachments by temporary agreements. Such territorial aggressions have been due largely to dynastic rivalries, which will doubtless disappear with the growth of democratic institutions. But the removal of dynastic rivalries will not, it is safe to say, remove the causes of war, or reduce the agencies by which wars may still be carried on.

It must be evident to the most indifferent person that we can never hope to reach a condition of universal peace by a single effort or stroke of the pen. The history of human society affords no substantial basis for such an illusion. We may, however, hope to approach much nearer that desired goal by progressive steps, guided by wisdom and experience. By tracing the course of social development, we have been able to mark out, in general, certain stages of progress through which a condition of relative peace has been attained, both in the national society and, to a certain extent, in the wider sphere of international relations. The difficulties of the present world-problem suggest

the importance of first conserving the valuable results that have already been secured. The steps that have already proved beneficial in the past may indicate the lines of progress that may prove successful in the future. The evolution of peace has thus far, as we have seen, been marked by the following features: (1) by the restraints imposed upon the undue exercise of physical force in the conduct of war; (2) by the substitution of pacific, in place of hostile, means of settling disputes, in the form of arbitration and judicial procedure; (3) by the definition of rights, and the development of a recognized system of law; and (4) by the progressive organization of society, and the growth of a common authority capable, more or less, of enforcing obedience.

(1) Without doubt, the most imperative need of the present is the restoration and security of the restraints which were recognized before the recent conflict upon the undue exercise of force in the conduct of war. When one recalls the restrictions that already existed in the accepted "Law of Nations," for the protection of the prisoners of war, of the sick and wounded, of non-combatants, of the rights of neutrals, of charitable and scientific institutions, of non-hostile property, etc.—he may realize the immediate need of restoring and maintaining these pacific rules of war. When one also considers the new implements of destruction brought into use during the recent hostilities —for example, poisonous gases, hostile submarines, and bomb-throwing aeroplanes and dirigibles—he must reach the conclusion that new restraints must be placed upon warlike equipments. As long as men have in their hands unnecessary weapons of war they will be inclined to use such weapons for illegitimate purposes.

The possession of superfluous arms is an inducement to the unrestrained use of such arms.

The most successful recent effort to impose restraints upon the undue exercise of force in war—an effort that was undertaken at the Conference of The Hague—is seen in the policy adopted at the Washington Conference for the Limitation of Armaments. This is one of the most notable examples in recent times of conforming to what we have conceived to be one of the historical laws of social evolution, in the effort to advance the cause of peace by continuing to restrain the exercise of force. These restrictions have thus far been chiefly directed only to stabilizing the fortifications in the Pacific and the limitation of naval armaments in respect to the tonnage of capital ships and the calibre of the heavier class of ordnance. How far these restraints might be continued, for example, in the direction of the reduction of land forces, the restriction of the manufacture of superfluous military equipments, and the prohibition of the newly developed instruments of war remains a part of the present world-problem.

(2) Of the attempts made since the war to advance the cause of peace and to solve one of the factors of the world-problem, the most promising has doubtless been in the direction of substituting pacific in place of hostile means for the settlement of international disputes. Voluntary arbitration had been already employed, to a considerable extent, by the more civilized states; and even what was called "obligatory arbitration" was professedly accepted by certain individual states as the result of special treaties. But no general system had been adopted which possessed the character of a regularly constituted judicature. The attempt of The

Hague Conference to organize a "Court of Arbitral Justice" had proved unsuccessful. It was reserved for the League of Nations to provide for "the establishment of a Permanent Court of International Justice," which "shall be competent to hear and determine any dispute of an international character which the parties thereto submit to it." In accordance with this provision such a Court has been definitely organized, with a fixed body of select judges having "jurisdiction to hear and determine suits between States." (See *The Covenant of the League of Nations, Arts.* 12–17; also *Draft of the Permanent Court of International Justice*—both published by the "World Peace Foundation.")

Notwithstanding the high character of this permanent tribunal and the high hopes it has inspired, it may be a question whether it has yet attained all that is desirable. Its establishment was certainly in accord with what we have regarded as the normal law of progressive development. But there are still certain criticisms or objections, which may, or may not, prove to be well-founded.

In the first place, it is objected that it is not properly a World Court, being established by the League of Nations, and inaccessible to those nations not members of the League. By referring to the "Covenant" (Art. 14) it will be seen that the Court was planned, or proposed, by the League. Its actual organization, and establishment, it is true, were effected by a supplementary statute, or "Protocol,"—which specially provided that "the Court shall be open to the members of the League, and also to states mentioned in the Annex of the 'Covenant'" (Art. 85.) Among the three names mentioned in the Annex is that of the

United States. It should, moreover, be kept in mind that, while the Court itself is an institution apparently separate from the League, having a distinct legal status created by an independent organic act, it must be admitted that this organic act, or so-called "Protocol," was framed by the League itself.

In the next place, an objection is made to the mode in which the judges of the Court are selected. The Court consists of fifteen members, eleven regular judges and four deputy judges. All these judges must be elected by the members of the League—i.e., the Council of nine members, and the Assembly composed of the delegates from the various states making up the League—although the preliminary nomination of the candidates for election is made by the members of the Court of Arbitration at The Hague. But the fact that the final election must be made exclusively by the members of the League, gives color to the objection that the tribunal is not so much a "World Court" as a "League Court." Although this may be the most practical method of election, it seems desirable that supplementary provisions should be made to meet this objection.

Finally, the objection is sometimes made that the jurisdiction of the Court is simply *voluntary* and not *obligatory*. It is true that no state is obliged to submit its case to the Court without its own consent; it is, however, also true that any state can, (in advance by treaty stipulation) agree to submit to all future summonses and decisions of the Court. However desirable it might be that all states should be obliged to submit to such a judicial tribunal, it is difficult to see how, in the present condition of the world, any international court can possess an effective

sanction, except by treaty stipulations, or by the moral force of public opinion.

(3) The next feature of the world-problem, according to our historical analysis, has reference to the definition of rights and the growth of a recognized system of law. It is obviously the first duty of the law-abiding nations of the world to restore, the binding force of the law, so far as it was accepted before the late war. It is of course the height of folly to suppose that international law has ceased to exist on account of any infractions made upon it. The infraction of a law does not destroy the law itself, especially if the attempt to destroy it has been completely foiled. The existing "Law of Nations" is the fundamental basis of our present international system, so far as we can be said to have such a system. With all its beneficent provisions and possible defects it has been rescued from threatened destruction and furnishes the real and substantial basis for further legal development. It seems clear that the advancement of peace would be greatly promoted by a more definite and intelligible statement of its accepted principles. An important step, therefore, in the direction of peace would seem to be the reduction of the existing law to a codified form by the concurrent action of those states which are already committed to the cause of peace.

The general indisposition to codify the existing law by the action of independent states has already furnished the excuse for, at least, two notable attempts on the part of individuals to effect such a codification —that of Professor Bluntschli of Heidelberg, and that of David Dudley Field, an American jurist. But these private drafts have failed to receive official ac-

ceptance. The chief objections to a general code have been the difficulty of obtaining universal approval by all states, and also the fear that such a code would tend to arrest the organic growth of the law itself. These objections, however, might perhaps be met by the adoption of some method of "progressive codification," whereby a provisional code might be adopted which would receive the assent of the majority of states, and to which other states might have access at their own option. International law, as it is understood today, can have no binding force, except so far as it receives the express or tacit consent of those states which are admitted to its privileges and recognize its obligations. The suggested method of "progressive codification" would indicate how far those states which profess to belong to the "family of nations" were in accord with the principles which the law endeavors to make obligatory. It would, at least, express an official consensus of international opinion that would have great weight with those governments that might still hold dissentient views.

But the highest juristic wisdom does not consist in simply preserving the existing law. The existing law, whether codified or not, tends to become stereotyped and irresponsive to the demands of an advancing society. If an appeal to history can throw any light upon the early stages of legal growth, it may also indicate the way in which the law may keep pace with social progress. We have already seen that law has its origin, not in the "prescribed commands of a determinate superior" (according to the Austinian theory), but in the traditional customs of early society. The early customs that found an expression in the forms of law were, for the most part, incident to the protection of

personal rights; they were due to the natural disposition to resent or redress a conscious injury committed, to right a wrong inflicted, and hence were prompted by an instinctive sense of justice.. With the enlargement of society and the multiplication of the points of contact between its members, the law became extended in range. But by the persistent respect paid to its traditional forms, it became an unyielding mass of fixed and stereotyped rules, in which its forms were conscientiously preserved while its spirit was unconsciously lost. This was practically the condition reached in the ancient civil law of Rome at the time of the XII Tables, and in the early common law of England.

The most remarkable liberalizing movement in the history of jurisprudence has been that which has led to the expansion of the law by the development of a supplementary body of equitable principles to meet the demands of a growing state. The historical student needs hardly to be reminded of the wonderful results produced by the growth of the *"jus gentium"* (in its earlier sense as the *usage of nations,* and in its later sense as the *law of nature*) in the hands of the Roman pretors and jurisconsults, and also of the system of "Equity" under the administration of the English chancellors. Suffice it to say that this conception of Equity, not as a philosophical idea, but as a juristic principle, has tended to preserve the spirit of the existing law, and has contributed greatly to the progress of jurisprudence in the modern civilized states having either a Roman or an English origin. By such means the law has been kept, more or less, in harmony with social progress and the higher principles of justice.

The question may now be pertinent: How far does the origin and growth of the law among the civilized nations of the world have a bearing upon the present condition and further development of international law. The reply to this question may be: Only so far as international law has a similar origin and may be similarly improved by corrective methods. It is generally conceded that the existing rules that control the intercourse and relations among sovereign states have been derived almost entirely from custom; and like all customary laws, these rules have tended to become traditional and inflexible. It is equally true that the only way in which the existing law can be improved is by keeping it, as far as possible, in harmony with the principles of equity and justice. It is possible that the so-called "*positive* school," by insisting that this science should deal only with what the law *is*, and not with what the law *ought* to be, tends to encourage the divorce between law and justice. It seems reasonable that all law that is intended to control human society, whether national or international, should look not only to the past, but to the present and to the future. It should not simply conserve the rules intended for an older condition of things; it should also provide for the newer conditions that have arisen with the progress of mankind. It has justice for its beginning; it has justice also for its end. The resources of justice have not been entirely exhausted in the growth of the law which *is;* there still remains an abundant residue that may be made efficacious in the development of the law which *ought* to be.

For the sake of peace, the law should not only attempt to control the conduct of war; it should determine as well the just causes of war. It should not

only afford a means for the pacific settlement of disputes; it should seek as well to remove the occasions of international strife. It should strive, as far as possible, to prevent the violent antagonisms of race; the encroachments upon territorial integrity; the exploitation of national resources; the aggressive spirit of commercial rivalry; the infractions of treaties and conventions; the devious ways of secret diplomacy;— and all forms of international injustice that infringe upon the legitimate rights of nations.

One of the greatest needs, therefore, presented by the world-problem of today is the incorporation of a larger element of equity and justice into the law and practice of nations, either by means of judicial interpretation, which would be rendered possible by the erection of a permanent international court, or by the concurrent action of the civilized nations of the world.

(4) The final agency that we have noticed for the preservation of peace, is the organization of society with a common authority sufficient to ensure obedience on the part of its members. As we are committed to the historical method, we are relieved from taking account here of the many ideal projects that have been suggested for the creation of an international state. We also find little encouragement in tracing the historical attempts hitherto made to frame an effective international organization. The peace that has sometimes followed these attempts has probably been due quite as much to the exhaustion of previous wars as to the means adopted to prevent their recurrence. This seems true whether we consider the combination of the weaker states to resist the encroachment of a stronger power, as was the case under the "balance of power"; or the union of the greater Powers to enforce their

will upon the smaller and refractory ones, as was the case under the "European Concert." While in both of these cases there was ostensibly a laudable purpose to maintain peace, in neither case was there an international organization in the proper sense;—that is, an organic union of states based upon a community of interests and an equality of rights.

The recent "League of Nations" is probably the most successful attempt yet made to effect an international organization in the interests of peace. The experience of the previous World-War had led not only to a general conviction of the increasing horrors of war, but to a common consciousness of the great need of some institutional basis of peace. That the adopted "Covenant" was an advance upon the previous Concert of Europe there can be little doubt. That it was entirely divested of some of the objectional features of that earlier compact, may perhaps be a question. One is compelled to notice in the latter Covenant the evident predominance that is still given to the Great Powers that form the permanent members of the "Council," which constitutes the principal governing body of the League. It is also noticeable that the chief business of the "Assembly" is that which is referred to it by the Council, and that the most important matters which are left to this Assembly must not only be approved by a majority of the members of the Assembly, but also be concurred in by the members of the Council. Also, the backward communities over which the League assumes control are placed under the tutelage of "mandatories" whose authority is "explicitly defined, in each case by the Council." It thus seems evident that the great Powers, which form the four permanent members of the Council, hold

a decisive, if not dictatorial, voice in the League, which reminds us of the "Four Great Powers," which really held dictatorial powers in the European Concert. (*Covenant,* Arts. XV, XXII; *The First Assembly of the League of Nations,* pp. 42–44.)

Without emphasizing the experimental character of the present League, or withholding the desire that it may prove successful, it may be possible that a further appeal to history may throw some light on the method of approach to the question of international organization. The highest stage of social organization which marks the relative enlargement of the areas of peace, may be found, as we have already noticed, in the modern civilized state. And probably the most advanced form of the modern state is based on the principle of "federation." The granting to a superior power of sufficient authority to supervise inter-state relations and common interests, as well as the securing to the constituent members all the rights and powers incident to the control of their own affairs,—is the essential idea of the federal system. The realization of this idea seems to ensure, so far as the imperfections of human nature will permit, all the peace and happiness that can reasonably be expected in organized society.

The success of a world-organization must evidently depend upon the preservation of the clear distinction between the international authority and the national integrity. The attempt to obliterate the national spirit, the national authority and the nation's inherent rights, by the erection of a supra-national authority, will inevitably result in failure. In fact, the primary purpose of the creation of an international authority is to protect the rights of the nation from infringe-

ment, not to weaken or stifle the national life, but to secure it from injury and injustice from the encroachment of other nations, and inferentially from the encroachment of the international authority itself. To this end, is seems imperative that there should be, in the international organization, such a provision as a "bill of rights" defining those national rights and prerogatives which are, and which are not, beyond the reach of international intervention. The absence of such a definition of rights in the past has subjected the nations of Europe to the arbitrary dictation of the Great Powers.

It is no doubt equally true that effectively to promote peace and prevent injustice, the international authority should have sufficient power to exercise its legitimate and delegated functions. It is sometimes said that international law is not law in the strict sense, because it is not armed with adequate guaranties, or sanctions. There should manifestly be sufficient power, not so much to "enforce peace" as to "uphold the law" by which peace is assured. There seems, in general, to be an assumption that all law is maintained only by the exercise of armed force; and that international law can secure obedience only by some sort of international constabulary. The municipal law, which is conceded to be the most effective kind of law, is scarcely ever enforced by an armed body of troops. Every municipal law which appeals to the common sense of justice has the support of public opinion and the law-abiding portion of the community. So every international law which appeals to the general sense of justice can rely for its support upon the law-abiding portion of mankind, and if it does not make such an appeal, it may be a question

whether it ought to be enforced. At any rate, if a recalcitrant state resists by arms the international authority, which it has already accepted, the final resort seems to be an appeal to the law-abiding nations of the world to uphold the law.

In conclusion it may be said that, with all due deference to the League of Nations, there are still many vexed questions relating to world-organization, its structure, its powers, and the character of its sanctions, together with the larger problem in respect to the general relation between Nationalism and Internationalism, which are not yet entirely solved, and may require for their final solution a higher range of human intelligence, a deeper sense of human sympathy and justice, a wider community of human interests, than the world has yet attained.

(For some important references, see: F. S. Marvin, *The Evolution of World Peace;* W. Alison Phillips, *The Confederation of Europe;* David Jayne Hill, *World Organization and the Modern State,* also *The Rebuilding of Europe;* James Brown Scott, *The United States of America, a Study in International Organization;* J. E. Harley, *The League of Nations and the New International Law;* Frederick Pollock, *The Modern Law of Nations and the Prevention of War,* in *Cambridge Modern History,* Vol. XII, Ch. 28; James Viscount Bryce, *International Relations;* Hertslet, *Map of Europe by Treaty since 1814,* 4 Vols.)

Morey Book Helps Settle International Argument

March 1931 Democrat & Chron.

Shows Britain That Sauce for Goose Is Sauce for Gander

How a posthumous work by Dr. William Carey Morey, professor of history at the University of Rochester from 1872 to the time of his death early in 1925, was instrumental in settling an international dispute between the governments of Great Britain and the United States which took place in 1926 and threatened for a time to assume serious proportions, is revealed by William Roy Vallance, '10, assistant to the solicitor of state, in an article printed in the latest issue of the Rochester Alumni Review.

"Diplomatic Episodes," a book by Professor Morey which dealt with diplomatic episodes the history of the United State was the volume which, Mr. Va lance writes, brought about an u timate agreement "under whic the British government promis to help in the suppression of smu gling from the Bahamas and oth British territory."

The points at issue were broug to Mr. Vallance's attention for t first time on Dec. 2, 1925, wh a conference took place at t Department of State between re representatives of the two gover ments in which the main poi centered about enforcement of t prohibition law. The seizure of v